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ABSTRACT

This handbook summarizes current legal doctrine, state statutes, and federal and state regulations regarding the treatment of public school pupils in Wisconsin. It reports on court decisions that are binding in Wisconsin and those from other courts around the country that illustrate how pupil issues have been handled in other jurisdictions. After an introductory overview, chapters 2, 3, and 4 discuss issues that spring from constitutional rights: free speech and expression, religion in the public schools, and search and seizure. Chapters 5, 6, and 7 discuss the ways in which schools can regulate the conduct of students without interfering with constitutional rights. Topics covered are student discipline, school sports and clubs (extracurricular activities), and compulsory attendance. The last three chapters discuss equal educational opportunity and education of handicapped children. Here the focus is on regulations as well as legal decisions, since many issues involving these groups arise from interpretation of state and federal regulations. Accordingly, separate chapters are provided on substantive and procedural issues pertaining to education of the handicapped. (TE)

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STUDENT RIGHTS AND RESPONSIBILITIES: A Handbook on School Law in Wisconsin

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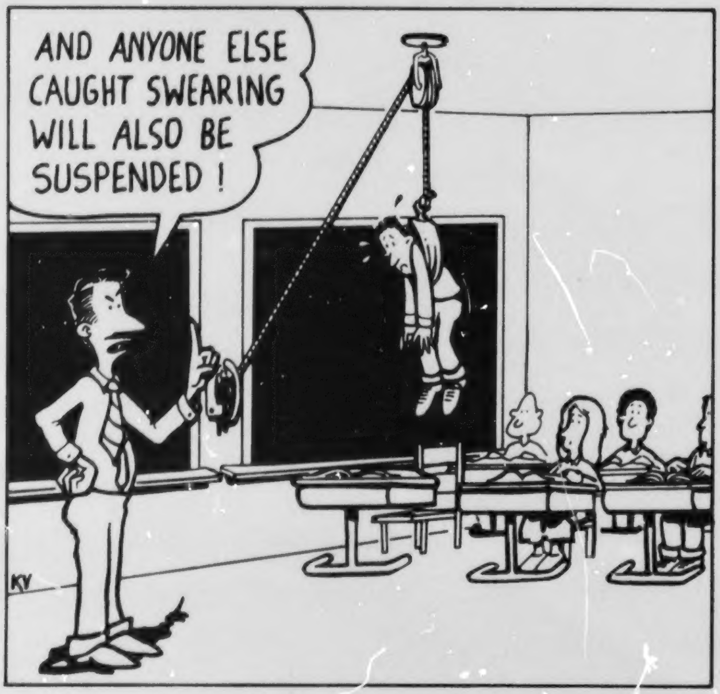
AND ANYONE ELSE CAUGHT SWEARING WILL ALSO BE SUSPENDED !
KV

by Henry S. Lufler, Jr., and Blanche Kushner

EA 016 837

Wisconsin Center for Education Research
an institute for the study of diversity in schooling
Program Report 84-2
February 1984

STUDENT RIGHTS AND RESPONSIBILITIES:
A HANDBOOK ON SCHOOL LAW IN WISCONSIN

Henry S. Lufler, Jr.
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Wisconsin Center for Education Research
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University of Wisconsin-Madison

February 1984

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To Sylvia Tiven, for showing that the existence of rules doesn't mean that students can't be served, and for her love and concern in the last twenty years.

-H.S.L.

To my mother and father, Ruth and Alvin Kushner, for their example and their love.

-B.A.K.

ACKNOWLEDGMENTS

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Helen Tetzlaff, University of Wisconsin-Madison, School of Education Dean's Office, typed most of the manuscript and kept track of many files, all of which the authors labeled with approximately the same heading. Bonnie Hayward inherited the project word processor disks and prepared the final version.

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Stephen Willson, Principal of Portage Senior High School, analyzed the handbook from the perspective of the practicing administrator. At several points he encouraged us to include more information of the "what do you do when that doesn't work" variety. In addition, much of the remaining legal jargon was removed at his urging.

Our thanks to all those who helped out. The authors will take the blame, however, for any errors remaining. Comments from readers are encouraged, as we hope to revise and update the work in the future.

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CHAPTER 1

INTRODUCTION:
CONTEMPORARY SCHOOL LAW

I. Increasing School Litigation and This Handbook.

This handbook summarizes current legal doctrine, state statutes, and federal and state regulations regarding the treatment of public school pupils. It reports on court decisions which are binding in Wisconsin, such as those by the Wisconsin Supreme Court or the federal Seventh Circuit Court of Appeals in Chicago, and those from other courts around the country which illustrate how pupil issues have been dealt with in other jurisdictions. Most of these cases do not offer absolute prescriptions on how to deal with a particular situation. In fact, there are few areas of school law which are sufficiently settled so that absolute guidelines can be written. In many, however, there are clear trends which cause us to suggest particular policies be written for schools or teachers to follow. While the facts of cases always vary, there are some subjects for which general approaches can be suggested.

In some areas, we suggest behavior which teachers and administrators will wish to avoid, at least if they wish not to be caught up in lengthy litigation. Student strip searches, for example, or outright bans on the distribution of pamphlets, are frequently the source of litigation. Policies for school personnel to follow which cover these areas can help structure a sensible response should these issues emerge. School responses to the occasional constitutional issue which occurs during the school year is too often made without the availability of or reference to such policies. By the time an attorney is consulted or a call is made to the Department of Public Instruction or a University school law faculty member, actions have already been taken which are both unwise and irreversible. Too often, school personnel find themselves in a "how did we get ourselves into this" position.

Litigation involving schools has grown significantly, for a number of reasons. Schools are sometimes the battleground for issues the larger society is confronting. Religious, social or political groups often seek to control school curriculum, or the content of libraries, or to present controversial speakers or programs. Students have the right both to receive ideas and to be free from the receipt of those which are unwanted. Thus schools are required to engage in delicate balancing and special interest groups sometimes use litigation to push schools in one direction or the other.

State and federal governments have also increased their demands on schools, requiring special programs for the handicapped and students from ethnic and social minorities. Regulations for these efforts are encyclopedic, as the chapters in this publication which discuss them indicate. Lawsuits over the provision of these special services are commonplace, due in part

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to the cost and nature of the services and in part to the fact that key terms in the regulations were not precisely defined.

Finally, people are simply suing one another more often in the 1980s. The willingness of people to file suit, combined with the wide variety of controversial subject areas in schools in which such suits are possible, makes knowledge of school law particularly important for school administrators and teachers.

In addition to doing something which leads to lawsuit, school personnel occasionally fail to act because, in some situations, they have an unwarranted fear of the legal consequences. Teachers, then, may fail to discipline students when it is needed, or work under the mistaken feeling that they are open to personal liability for their every act. In fact, teachers who use their best professional judgement in a difficult situation are seldom held liable by courts for their actions. This handbook should help ease teachers' fears because, in fact, court decisions have not restricted the professional judgments of school personnel to the extent that some believe.

II. Organization of This Book.

In this handbook we are seeking to present the current state of school law on the treatment of pupils. Where the law is unsettled we say so and where schools would benefit from written policies we recommend them. In the next three chapters we discuss issues which spring from constitutional rights, the amendments to the United States Constitution guaranteeing free speech, the right to religious freedom and the right to be free from unreasonable searches. Students have rights and we are not reluctant to urge that these be honored.

Chapters 5-7 discuss the ways in which schools can regulate the conduct of students, without interfering with constitutional rights, in order that schools can be effective learning environments for the majority of students. Discipline, generally, and attendance, specifically, are discussed. The special problems associated with extracurricular activities are introduced.

The last three chapters discuss special groups, including the handicapped and racial minorities. Here the focus is on regulations as well as legal decisions, since so many issues involving these groups arise from the interpretation of state and federal regulations.

We have tried to suggest, in the chapters which follow, ways in which legal issues common in schools might be viewed. School law is ever changing and it is not possible to use this publication as a cookbook, opening to a certain page to see exactly how to proceed. Hopefully, this summary of school law will instead give a sense of when the potential for disputes is present and how some court or other outsider might view the issue once it arises. It might also help suggest when legal counsel should be consulted to handle a particular problem.

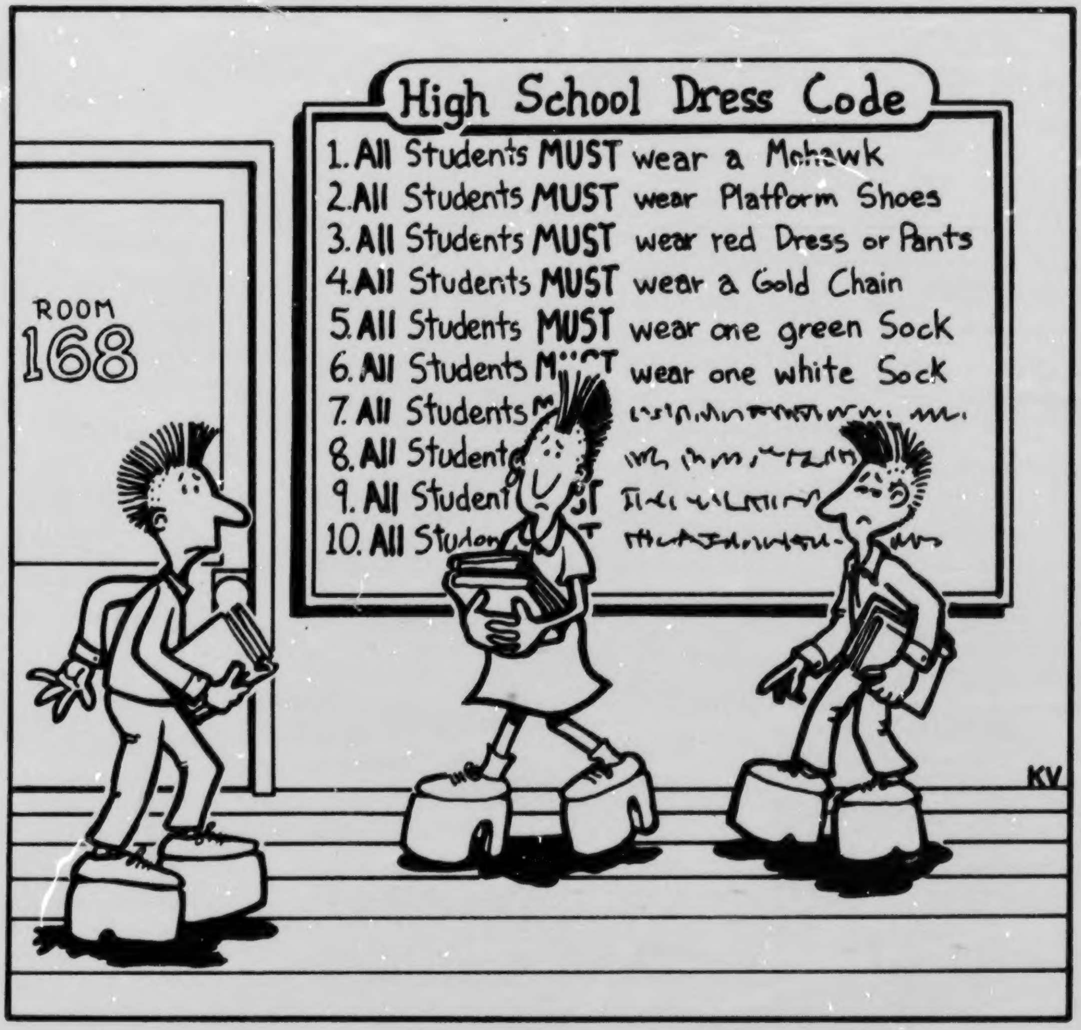
III. Comments on Sources.

In this book we've tried to use footnotes to help readers locate other sources which might be useful. Many footnotes cite cases and we have followed the Uniform System of Citation published by the Harvard Law Review for abbreviating case locations. Because the uniform system is difficult to read when law reviews or journals are cited, we've employed a social science format for listing those.

Readers wishing to keep up to date on school law issues should consider joining the National Organization on Legal Problems in Education (NOLPE). NOLPE membership provides summaries of recent cases. The NOLPE Yearbook of School Law discusses all federal court and state appellate court cases decided in the previous year. The Yearbook covers all cases of interest to schools, including employee relations, pupils, property, and torts. Education Daily summarizes current court actions and, for the school law junkie, has the advantage of arriving five days a week. Legal issues are also briefly discussed in the "Legal Corner" column appearing in the State Superintendent of Public Instruction's Newsletter and in the "De Jure" column by Tom Flygare which appears each month in the Phi Delta Kappan.

CHAPTER 2

FREE SPEECH AND EXPRESSION


High School Dress Code
1. All Students MUST wear a Mohawk
2. All Students MUST wear Platform Shoes
3. All Students MUST wear red Dress or Pants
4. All Students MUST wear a Gold Chain
5. All Students MUST wear one green Sock
6. All Students MUST wear one white Sock
7. All Students
8. All Student
9. All Student
10. All Stu
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1. What limits may be placed on student speech or expression and what must schools do to avoid enacting excessive rules?

2. To what extent are student demonstrations protected by the first amendment?

3. Can schools regulate the personal appearance of students?

4. Can school officials ban the distribution of critical or obscene publications on school grounds?

5. Can school boards pass standards for the selection of textbooks or school library books?

6. Can books which community citizens judge obscene be removed from school libraries? What is the difference between school and community libraries?

I. Constitutional Rights of Students.

The First Amendment of the United States Constitution and Article I, Section 3, of the Wisconsin Constitution both guarantee citizens the freedom of expression.[1] Until the 1960s, this right was not extended to students within the school setting. School officials once were granted broad discretion to limit the speech or appearance of students, and courts were hesitant to overrule the judgment of school personnel in setting such limits. Any rule that had a reasonable relation to an appropriate educational goal, such as promoting school discipline, was judged constitutional. Times have changed.

In 1969, the United States Supreme Court ruled that children in school are protected by the First Amendment of the United States Constitution. The Court said in *Tinker v. Des Moines Independent Community School District*,[2] a Vietnam protest case involving students who had worn black armbands to school, "Students and teachers do not shed their constitutional rights to freedom of speech or expression at the schoolhouse gate." School officials, the Supreme Court ruled, cannot exercise absolute authority over their students, because students in school have fundamental rights. As this chapter will detail, schools can make rules which limit pupils' freedom of expression, but must have substantial justification for their actions. The United States Constitution protects symbolic expression as well as pure speech. Under certain circumstances a student's right to wear armbands,[3] hold peaceful demonstrations,[4] refrain from standing during the Pledge of Allegiance,[5] and even to bring a same-sex date to a school dance[6] have been protected by the first amendment free speech clause

This chapter describes the circumstances under which speech or expression can be limited and the obligations which school districts have to ensure that such limitations are not excessive. The chapter discusses free speech or expression in a variety of contexts, including appearance, demonstrations, school publications, publications produced out of school, and the removal of books from school libraries.

First Amendment Balancing. The Tinker ruling and subsequent expression cases do not mean students have the absolute right to say whatever they like in whatever manner they wish. Courts balance the student's rights against the need for a smoothly running educational system. A compelling state interest, such as ensuring the safety of other students or preventing disruptions, may warrant abridging students' freedom of expression. Courts balance the right of expression against the need for order. In one case the Supreme Court described this process:

> A government regulation is sufficiently justified if it is within the constitutional power of the government; if it furthers an important or substantial governmental interest; if the government interest is unrelated to the suppression of free expression; and if the incidental restriction on alleged first amendment freedoms is no greater than is essential to the furtherance of that interest.[7]

In Wisconsin, statutes authorize school boards to make rules to govern the public schools of their district. Wisconsin Statute § 120.13(1) allows school officials to make rules "pertaining to conduct and dress of pupils in order to maintain good decorum and a favorable academic atmosphere." The statute further allows officials to suspend or expel students if they endanger the health, property, or safety of others at school under the control of school officials or threaten to use explosives to destroy school property. Thus the statute recognizes the maintenance of "good decorum," a "favorable academic atmosphere," and the "health and safety of school property and students" as adequate justifications for limiting students' free expression.

According to Tinker, there must be evidence that student expression would "materially and substantially interfere with school work" before school officials can prohibit it. Furthermore, an unsupported fear that disruption will occur is not enough. Predictions of disruption must be based in fact. The

Fifth Circuit Court of Appeals offered the following criteria for determining whether school rules violated students' free speech rights:

> What more was required at least was a determination, based on fact, not intuition, that the expected disruption would probably result from the exercise of the constitutional right and that foregoing such exercise would tend to make the expected disruption substantially less probable or less severe.[8]

The school's desire to avoid "discomfort" and "unpleasantness" is not sufficient reason to curtail student expression.[9]

If similar expressions have caused disturbances in the past or if there is a volatile atmosphere at the school, officials may be able to restrict the challenged conduct. However, schools must explore alternative means to prevent disruption and use the "least restrictive" means to obtain their objective, i.e., rules that least infringe upon constitutional rights. For example, a school regulation prohibiting the wearing of all buttons and other insignia was declared constitutional in 1960 by the Sixth Circuit Court of Appeals.[10] The school's population had changed from all white to 70% black, and racial tensions were high. A button proclaiming "Happy Easter, Dr. King" caused a fight at the school the previous year. Students argued they should be able to wear antiwar buttons since these would not aggravate the racial divisiveness in the school. The appeals court recognized, however, the administrative difficulty in policing button selection and determining which buttons are permissible and which are not. The court concluded that if all buttons were permitted, many students would seek to wear buttons conveying an inflammatory or provocative message or one which would be considered as an insult or affront to other students. These buttons would add to an already incendiary situation and would undoubtedly provoke further fighting among the students and lead to "material and substantial disruption of the educational process." Since the court found no practical alternative which would prevent disruption without limiting free expression, they sanctioned the school's actions.

In a more recent case, a student wearing a "Fuck the Draft" button was suspended when he refused to remove the button. A California appeals court found the school's action reasonable, noting that the student had other ways within the school to protest the draft, including a newspaper which the student personally distributed.[11]

Protection of Speech and Expression. Officials must explore alternative means to maintain discipline which do not silence free speech. For example, violent audience reaction should not prohibit students from expressing unpopular views in a peaceful manner. The school is responsible for protecting free speech whenever possible and officials must attempt to control disturbances from the opposition. Schools must use the least restrictive means to obtain their goals. This principle can be illustrated by looking at some specific examples.

A school in Texas prohibited students from wearing black armbands to protest the war in Vietnam.[12] None of the school officials expected the wearers of the black armbands to initiate disruption, but feared proponents of the war might cause trouble. The court ruled the armbands were a peaceful, rational way to express an idea. The armbands did not represent "fighting words" whose purpose was to incite confrontation. The court stressed the school's responsibility to try different avenues to prevent disruption. Officials should have tried to bring the differing student factions together to agree on peaceful relations. If this had failed, then prohibiting the black armbands might have been appropriate. The court concluded that school authorities have the responsibility to "nurture and protect" student expression "unless circumstances allow them no practical alternative."[13]

A Rhode Island court ruled it was unconstitutional to prevent a gay student from bringing a male escort to the senior prom, even though school officials feared a violent reaction.[14] The court said the fear of violence was probably justified, because the student had been taunted, spit upon, and slapped by fellow students after announcing his intention to take a male date to the prom. However, the student's actions were recognized as a political statement protected by the first amendment. The court ruled schools have an obligation to take reasonable measures to protect peaceful student expression. Barring the gay student from the prom was not the least restrictive means to prevent a disturbance. Additional security personnel at the dance would have reduced the likelihood of violence. The court stressed, "Even a legitimate interest in school discipline does not outweigh a student's right to peacefully express his views in an appropriate time, place, and manner. To rule otherwise would completely subvert free speech in the schools by granting other students a 'heckler's veto.'"[15] The couple attended and the dance occurred without incident.

Demonstrations. Schools may prohibit demonstrations on school grounds if they "materially disrupt school activities." It is probably not constitutional to deny all demonstrations on school premises, but officials can reasonably regulate the time, place, and manner of the demonstrations. Wisconsin Statute § 120.13 authorizes school officials to make rules in order to "maintain good decorum," "provide a favorable academic atmosphere," and "protect the health, safety, and property of students." Wisconsin Statutes §§ 120.13(1)(b) and 120.13(1)(c) say schools cannot suspend or expel students for actions while not on school property or under the supervision of a school authority, unless the conduct endangers students at school or school property.

Most court cases concerning demonstrations have originated from incidents occurring on college campuses. The cases relating to high school demonstrations, however, make it clear that students have the right to protest, under reasonable time and place restrictions. This can be illustrated by looking at specific cases.

A Pennsylvania federal court, for example, upheld the suspensions of high school students who held a sit-in in the school corridors.[16] However, the court said demonstrations on school property were not disruptive per se. The court warned that only the conduct of the demonstrators and not the reaction of the audience should be judged. The court found this particular sit-in disruptive to the educational program because participants failed to attend scheduled classes, prevented others from attending classes in session, and created noisy disturbances in the school halls.

The United States Supreme Court upheld a Rockford, Illinois ordinance which prohibited "willfully making noise or diversion that disturbs or tends to disturb the peace or good order of the school session."[17] The court recognized that some picketing or handbilling on public grounds near a school can effectively publicize grievances without disrupting schoolwork. However schools cannot tolerate "boisterous demonstrators who drown out classroom conversation, make studying impossible, block entrances or incite children to leave the schoolhouse."[18] The Supreme Court in this case was ruling on the validity of a city ordinance rather than the constitutionality of a school board policy.

The Fifth Circuit Court of Appeals reached a similar decision in a high school setting.[19] The court held it was constitutional to prohibit a demonstration on public property adjacent to school grounds when the demonstration interfered with the desegregation of the school system. However, the ban applied only to areas close to the high school and was effective only during school hours. The court also ruled school officials could not permanently ban all demonstrations near the high school. If circumstances changed, nondisruptive demonstrations would have to be allowed.

Controversial Speakers. Schools should have policies regarding appearances by outside speakers. Most controversies involving speakers occur when such policies are not followed, or when an invitation is withdrawn. Regulations which prohibit all outside speakers from appearing in school or which make distinctions based on the speaker's qualifications are constitutional. Schools may not, however, deny some speakers the opportunity to appear solely because their views are controversial or unpopular. However, if the speaker is likely to cause a substantial disruption in the school, he or she can probably be banned. An Oregon court ruled, for example, that schools could not ban all "political" speakers. It was feared the regulation would be used selectively to silence political views the administration opposed.[20] Some courts have ruled schools must offer equal time to differing points of view.[21] They contend school officials have a responsibility to present a balanced view of public issues.

Wisconsin Statute § 121.02(h) requires that schools provide "adequate instructional materials which reflect the cultural diversity and pluralistic nature of American society." This statute could form the basis for a legal challenge, were a Wisconsin school to prohibit an appearance by a speaker. Because these cases usually originate when someone in the school has invited a person to speak and the invitation is later challenged, school districts would be well advised to have a person designated to handle the selection of speakers.

II. Personal Appearance.

In the 1970s many students challenged the constitutionality of school hairstyle and dress codes. Although courts strongly disagreed on whether students had a constitutional right to wear the hairstyle and clothes of their choice at school, the United States Supreme Court refused to hear these cases and resolve the issue. School officials now seem to be more tolerant of different tastes in clothing and grooming, finding it is often more disruptive to take issue with a student's personal appearance than it is to allow some unorthodox dress or hairstyle.

In Wisconsin students may wear any hairstyle they wish as long as it does not substantially disrupt classroom activities. The Seventh Circuit Court of Appeals, whose decisions are binding in Wisconsin, has ruled the right to wear one's hair at any length and in any manner is a freedom protected by the United States Constitution.[22] In order to regulate a student's hair length, school officials must show that the hairstyle would substantially disrupt school activities or represent a health and safety threat. In the Seventh Circuit case, the challenged dress code had been approved by a majority vote of the student body. However, the court said this did not justify limiting the students' right to determine hair length.

Most rulings concerning hair length may also be applied to student dress. However, some courts have found regulating hairstyles burdens students' rights more than regulating clothing. Hair length has been recognized as more of a personal statement of identity, a form of symbolic expression, than clothing has. Schools may prohibit clothing which is unsanitary, obscene, or disruptive. Officials must be able to prove that the restricted clothing would substantially interfere with school activities or threaten student health and safety. Several examples can be cited to show the circumstances under which dress can be regulated.

Dress codes for which courts could find no justification have included a no-slacks rule for girls promulgated by a New York school district,[23] a New Hampshire no-jeans rule,[24] and dress codes for extracurricular activities,[25] unless related to a student's ability to perform the activity. Clothing which is soiled or otherwise constitutes a health hazard can be prohibited,[26] as can unusually immodest clothing or that with disruptive, obscene slogans or pictures.[27] The safety of students in certain classes, such as industrial arts or chemistry, may serve as the basis for additional rules. Again, courts look for a rational relationship between the rule and some desired goal, such as the safety of students.

III. Publications.

Student publications are protected by the Freedom of the Press Clause in the First Amendment of the United States Constitution and by the Wisconsin Constitution.[28] However, students do not have the absolute liberty to write and publish whatever they wish. Cases involving school publications invariably fall into gray areas where there are legal arguments which can be made both in favor of and against a publication ban. There are, however, a few general guidelines in the cases which have been decided, and these will be detailed in this section.

In general, the limits to a student's freedom of the press depends on whether publications are sponsored by the school or are student initiated. The more students can sever their relationship with the school, the greater freedom they have to publish without restrictions. Papers which are written, published, and distributed off school grounds and do not use school funds, staff, or equipment are treated like the public press. These publications cannot be restricted by school personnel, but must meet conventional libel and obscenity standards. If literature is sponsored by the school, officials can exert more control over the content.

Schools may refuse to fund publications of which they do not approve. Any publications distributed in the school or on its grounds are subject to reasonable regulations covering the time, place, and manner of delivery. Schools may also ban publications distributed on campus which materially disrupt classroom activity, interfere with the rights of other students, or contain obscene or libelous material. It is sometimes difficult, however, to sustain a claim that a publication is obscene.

School-Sponsored Papers. Generally, school-sponsored newspapers cannot be censored by school administrators solely because there is disagreement over their content.[29] There can be a refusal to print or distribute the paper, however, if a substantial disruption of the educational process would result.[30] Courts sometimes are called on to weigh these difficult matters of judgment, though the number of school newspaper cases has declined in recent years.

The Supreme Court decision in Tinker,[31] discussed more fully earlier in this chapter, applies to student publications as well as to political protest. School officials may ban publications on school grounds if they "materially and substantially" interfere with the operation of the school or there is a reasonable likelihood the literature will cause a disruption. As with other forms of student expression, an unsupported fear or expectation of disruption is not sufficient. School officials must have evidence to support their predictions. Banning the publication must also be the least restrictive means to avoid disruption.

In 1979 a New York court ruled a school official's decision to ban a student newspaper was constitutional, because he had a "rational basis grounded in fact for his conclusion that publication would create a substantial risk of disruption of school activities."[32] The publication contained an offensive and violent letter attributed to the lacrosse team. Faculty advisors testified the letter might lead to a confrontation between the team and newspaper staff. The court, under this set of facts, deferred to the expertise of school authorities.

In 1980 a Georgia court found school officials could not ban a student newpaper because they did not have a "reasonable basis to forecast significant and material disruption of high school activities."[33] The ban was invoked because the student newspaper contained a 1960 prosegregation quote by a present member of the school board. Officials argued that the quote would provoke racial tensions at the school. Upon inquiry with all parties involved, however, the court found racial relations at the school were admittedly good and expectations of disruptions were unfounded. The censorship was therefore overturned.

Papers Produced Off Campus. If the literature is produced off campus, the school cannot prevent its distribution on school grounds simply because the paper is unpopular or critical of the school. The Seventh Circuit Court of Appeals ruled, for example, that a student may not be suspended merely for criticizing school policies in a publication written off campus but distributed on school grounds.[34] The student had critiqued a pamphlet explaining school policies and procedures to parents. He used "strong, disrespectful language" and he said the Dean's handout was a "product of a sick mind" and urged students to destroy the pamphlet. Although the court noted the student's comments were tasteless, that was not sufficient to justify suspending him. Before taking disciplinary action, school authorities would have to forecast a substantial disruption of school activities. In this case there was no evidence the student body followed the advice to destroy the pamphlet.

The expulsion of students from the Brazil, Indiana, High School for distributing a leaflet with inflammatory content was upheld in a 1981 case.[35] The leaflet urged students to boycott school as a means of protesting new disciplinary rules in effect at the high school. In looking at the expulsion, the federal court considered the fact that students had walked out of the school on the day before in a related protest. The court considered this to be evidence that a "material disruption" might occur as the result of the pamphlet and it sustained the expulsion.

A Fifth Circuit Court of Appeals upheld the right of high school students to discuss controversial topics in an underground paper.[36] The student publication advocated the decriminalization of marijuana and offered information on drug counseling and birth control. The judge concluded, "Controversy is never sufficient in and of itself to stifle the views of any citizen."[37]

When publications or other materials substantially interfere with the rights of some students, courts have upheld restrictions on distribution. Students are a captive audience, and schools must not subject them to expression which might cause emotional or physical harm. Several cases illustrate this point.

A Second Circuit Court of Appeals ruled school authorities could prohibit distribution of a sex questionnaire to ninth- and tenth-grade students, because experts testified the questionnaire might cause emotional stress and psychological harm to a number of students of that age.[38] The court concluded that protecting student health and welfare is an appropriate rationale for limiting students' freedom of expression.

Courts have also upheld regulations if the questioned material endangers the physical health of students. The Fourth Circuit Court of Appeals ruled that school officials could constitutionally ban a school newspaper with a "headshop" advertisement, because it was a threat to the health and safety of the student body.[39] The court noted that while disruption is a standard frequently used in school first amendment cases, it is "merely one justification," and "nowhere has it been held to be the sole justification." The court reasoned that an advertisement promoting drug paraphernalia encourages actions that endanger student health and safety, and since protecting student health and safety is a legitimate rationale for limiting freedom of expression, school officials could constitutionally ban the advertisement.

Distribution Limits. Schools can formulate rules for the time, place, and manner of newspaper or pamphlet distribution. However, these regulations cannot be used as a pretext for limiting student expression. School officials must have an appropriate rationale for their restrictions. Officials must also try to achieve their objectives without limiting distribution. Rules on distribution cannot be vague, ambiguous, or overbroad. The rules should be in writing so that all parties understand them.

Schools also may have distribution rules which prevent material disruption of classwork. However, the Seventh Circuit Court of Appeals found a regulation which prohibited all student distribution of literature during the school day to be overly broad.[40] The court recognized that students have free periods when they are not involved in classroom activity. School officials failed to show that distribution to these students would substantially disrupt classes in session.

Another Seventh Circuit case recognized that safety is an appropriate rationale for distribution rules. Schools can prohibit distribution during fire drills or in congested areas.[41] Schools can also make rules to prevent litter as long as the regulations do not totally prohibit distribution.

Student Papers Off Campus. Wisconsin Statute § 120.13(1)(b) allows schools to suspend students for conduct off the school premises only if the pupil endangers the health, safety, or property of others at school.[42] Schools, then, do not have authority to regulate student expression off campus when the materials do not appear in the school. In 1980 the United States Supreme Court left intact a 1979 Second Circuit Court of Appeals ruling that off-campus publications enjoy the same constitutional protections as the public press.[43] The student publication in question, *Hard Times*, had been conceived, executed, and distributed outside the school. Even though *Hard Times* was admittedly vulgar, the court ruled school officials

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could not punish students for its publication. The court recognized that, in order to maintain appropriate discipline and functioning of the school, officials may curtail disruptive, obscene, or libelous expression within the school setting. However, the school's authority to limit free expression must be strictly confined to its boundaries. "When school officials are authorized only to punish speech on school property, the student is free to speak his mind when the school day ends. In this manner, the community is not deprived of the salutary effects of expression, and educational authorities are free to establish an academic environment in which the teaching and learning process can proceed free of disruption."[44] The court left open the question whether Hard Times could have been banned if distributed on school grounds. Although it was not obscene by adult standards, Hard Times might have been judged inappropriate for school-age children.

Obscene Materials. Schools can refuse to finance newspapers at the high school level, since they are under no obligation to fund any student publication. Nevertheless, there is case law at the college level that rules it is unconstitutional to withdraw financial support, thereby censoring free expression through the "power of the purse," when a newspaper prints controversial stories.[45]

Schools may, however, restrict publications which are obscene or libelous if they are distributed on campus. The legal definition of libel involves a written statement which is false and harms a person's reputation. If the person harmed is a public official, he or she must prove the writer knew the statement was false or could easily have discovered that fact.[46] Generally, publicly elected or appointed positions are considered to be "public officials." Teachers generally are not. The following examples of libel involving public officials may help: "writing falsely that the principal stole $1000 may be libelous; an editorial alleging that many teachers in a school district are incompetent probably is not."[47]

A New York court ruled that it was constitutional to prevent the publication of a student newspaper which contained a libelous letter.[48] The letter said the vice-president of the student government had been a total failure in performing his duties and had been suspended from school. Since the student government member was not considered a public official, it was possible to ban the letter without proving the writer knew it was false. Further, school officials did not need absolute proof the letter was false before they restricted its publication. The principal's knowledge of the student and his belief that the letter would cause the student irreparable harm formed a "rational and substantial basis" for prohibiting the letter's publication, the court concluded.

The United States Supreme Court has defined obscenity as a work which (a) on the whole appeals to prurient interests in sex, (b) describes sexual conduct in a patently offensive way, and (c) lacks serious literary, artistic, political, or scientific value.[49] The Court used "contemporary community standards" to determine what is offensive or lacks worth. In 1980 the Wisconsin obscenity statute, § 944.21(1)(a), which simply forbade publishing "lewd, obscene, or indecent written matter," was declared unconstitutionally vague and overbroad by the Wisconsin Supreme Court.[50] The court suggested redrafting the statute to comply with the United States Supreme Court standards set in *Miller v. California*.

It is not clear whether schools can apply stricter obscenity standards than other units of government. A Second Circuit Court of Appeals recognized the state's right to legislate variable standards of obscenity with respect to children.[51] It ruled schools may suppress expression that is suitable for adults because of its potential effects on children.

Whether courts use the *Miller* test or a narrower standard for children, profanity is not necessarily obscene. In *Jacobs v. Board of School Commissioners* the Seventh Circuit Court of Appeals has ruled that distinctions must be drawn between obscene material and profanity.[52] A student newspaper involved in this litigation contained "earthy words relating to bodily functions and sexual intercourse." The judge concluded, "making the widest conceivable allowances for differences between adults and high school students with respect to perception, maturity, or sensitivity, the questioned material could not be said to fulfill the *Miller* definition of obscenity."[53] A Georgia case ruled the word "damn" was not obscene even when using standards specifically formulated for minors aged 14-18.[54]

IV. Libraries and Textbooks.

Almost no cases have challenged the right of school districts to select classroom textbooks. There is strong disagreement among courts, however, concerning the extent to which students have a first amendment right to have access to materials in school libraries. Some decisions have awarded school officials broad discretion to decide what books will remain in their school libraries and classrooms. Other courts have strictly limited the school's authority and have described procedures they feel are permitted by the Constitution. Because the law in this area is in flux and feelings are strong, local controversies can often lead to lawsuits. School boards are well advised to establish clear and specific guidelines for book removal and purchasing. Generally, the policies should insure that varying points of view on social issues are offered in libraries and that books are not summarily removed just because their contents are offensive to one group. The guidelines should include procedures to assure fair decisions, including appeal processes for those who are dissatisfied. These precautions will not only protect student rights, but will form a basis for negotiation before disagreements escalate into legal battles.

School libraries, by their nature, offer a more restricted choice of books than a public library. They are auxiliary facilities run on limited budgets. According to Zykan v. Warsaw Community School Corporation,[55] school officials have the responsibility for providing materials that complement the curriculum and serve the needs of a diverse student body. "An administrator would be lax if she failed to monitor closely the contents of the library and did not remove a book when an appraisal of its contents fails to justify its continued use of valuable shelf space."[56] Wisconsin Statute § 121.02(h) directs school districts to "provide adequate instructional materials, texts, and library services which reflect the cultural diversity and pluralistic nature of American society." Schools have broad discretion to decide which books best serve these purposes. Since students may check out books from the public library which are not present in their school libraries, they are not necessarily deprived access to those thoughts and ideas.

Decisions to remove books once they are purchased and placed in a school library, when an individual or group complains about the contents, presents an additional set of problems. Most courts agree there are some constitutional limits on the schools' authority to remove books from school libraries. However, courts differ on the amount of discretion they give school administrators to decide which books should be removed. This issue finally reached the United States Supreme Court in the 1982 case Pico v. Board of Education, Island Trees Union Free School District.

The issue began in 1975 when a New York school board, in response to pressure from a politically conservative parents' group, removed nine books from the Island Trees school libraries. The books included works by Kurt Vonnegut, Oliver LaFarge, Eldridge Cleaver, and Bernard Malamud. No school official had read the works, and the board did not follow its own library policies in taking the action. A "Book Review Committee" appointed by the board later recommended that some of the books be restored, but the board rejected the committee's suggestions. Suit was then filed in district court, claiming that the removal violated the first amendment rights of students. The court granted the school board summary judgment, holding that "while removal of such books from a school library may . . . reflect a misguided educational philosophy, it does not constitute a sharp and direct infringement of any first amendment right."[57]

The Second Circuit Court of Appeals reversed this decision and, as a precursor of things to come, each of the three judges on the appeals panel wrote a separate opinion.[58] The Second Circuit majority did conclude that the petitioners should have had an opportunity to argue the first amendment issues and that the board should reply by defending their intervention into school library decision making. It was the decision ordering the rehearing which was appealed to and upheld by a divided Supreme Court.[59]

In the Supreme Court's plurality opinion, Justice Brennan articulated a number of conclusions about the case at hand, none of which attracted support from a majority of the Court. He observed that the case involved library books which were not part of required reading lists and that book removal, not acquisition, was at issue. He suggested that separate standards should apply when these factors were present. He observed that school boards did not have absolute discretion to remove library books simply because they did not like the ideas contained in them, but that genuine issues of fact remained unresolved as to whether or not a constitutional violation was present in the removal, thus necessitating the need for a rehearing. In reaching this conclusion, Justice Brennan argued that "the right to receive ideas" was a necessary predecessor to the recipients' own ability to exercise first amendment rights.[60] Thus the right to receive ideas or information was protected by the first amendment.

It was this extension of the first amendment to which Justice Blackmun objected in his concurring opinion. In espousing a more traditional view of first amendment balancing, he noted the issue was one in which the Court "must reconcile the schools' 'inculcative' function with the first amendment's bar on 'prescriptions of orthodoxy.'"[61] But "with a record as sparse as the one before us," Blackmun was unable to decide whether the school board had exceeded its authority, and he voted for the remand. Justice White concurred, complaining about the unnecessary "dissertation" on the first amendment contained in the plurality opinion. He concluded, "We should not decide constitutional questions until it is necessary to do so. . . ."[62] White was the only justice to avoid the first amendment issues.

The four remaining justices joined Chief Justice Burger in his dissent, though each also wrote separately. The Chief Justice argued that the plurality opinion transformed "optional" reading into a "right" and took exception to the distinctions in the Court's opinion between removing and acquiring books and between decisions involving classrooms and those concerned with libraries. "No amount of 'limiting' language could rein in the sweeping 'right' the plurality would create," the Chief Justice argued.[63] Justice Powell, in still sharper language, took issue with the right-to-receive-ideas concept, claiming that the failure to remove nine "vulgar or racist books" symbolized a "debilitating encroachment upon the institutions of a free people."[64] He attached an appendix to his dissent with excerpts from the nine books that he found offensive. Justice Rehnquist found the plurality opinion "largely hypothetical" and argued that the district court was correct in its summary judgment. In her two-paragraph dissent Justice O'Connor supported the power of school boards to make decisions about books, while not personally agreeing with the board's action with respect to some of the books in the case at hand.

The fractured nature of the Supreme Court's decision, with Justice White not confronting the constitutional issues at all, guarantees further litigation on the question of the first amendment and school libraries. Whether they are, as Justice Brennan characterized, institutions separate from the rest of the school, where access to ideas has additional constitutional protection, or whether they are totally under a school board's control, as argued by the dissenting justices, remains to be decided. Equally unclear are questions regarding the importance of following procedures for book removal, and the question of whether a simple assertion that a work is vulgar or obscene can withstand counterclaims that a book is being removed for political reasons.

In a case with frequent reference to Pico, a Maine district court ordered a banned book restored to a school library.[65] The book, 365 Days, is a series of nonfictional accounts of the Vietnam war by American combat soldiers. It reposed peacefully in the Beileyville High School library from 1971 to 1981 when a parent asked that it be removed because it contained objectionable language, a four-letter word. While neither the parent, the superintendent, nor the board had read the book, the board ordered it removed. The board ban also prohibited any student from carrying the book on school property, including school buses. Finding a "rudimentary" right to receive information and ideas, the court concluded that the school committee had failed to determine whether harm would befall all students who read the work. The court also noted that the board had no procedures at all for cases such as this and concluded that the ban was unconstitutionally overbroad. An interim injunction ordered the book returned to the school library.

Some courts have ruled students have a first amendment "right to know."[66] Those courts do recognize school authority initially to select books for their libraries. However, after the book is shelved, these courts hold it develops "tenure" and the book's removal is constitutionally prohibited. According to these decisions, the Constitution forbids school officials from banning books because they disagree with the content on personal, moral, political, or social grounds. Even in the circuit courts of appeal recognizing a constitutional "right to know," it is permissible to remove books because they are obscene for minors, or obsolete, or because the library is overcrowded.

On the other hand, some courts give school officials wide discretion in controlling the content of their libraries. A Seventh Circuit decision envisioned the role of the public schools as encouraging and nurturing fundamental social, political, and moral values to prepare students to take their place in the community.[67] The court therefore sanctioned educational decisions based on the personal tastes and mores of school board members and ruled the Constitution does not prohibit such criteria.

Obscenity and Removal. In 1980 a Second Circuit case ruled there was no first amendment violation in removing books on the basis of vulgarity or indecency of language.[68] The fact that board members applied their own standards did not make the decision invalid. Further, the court declared, "Students have no constitutional right of access on school property to material that, whatever its literary merits, is fairly characterized as vulgar and indecent in the school context."[69]

The musical "Pippin," which was to have been performed by Dover, Delaware, high school students, was cancelled by that district's superintendent when he determined that the play contained sexually explicit scenes. The director and an assistant principal had revised some of the scenes to make them, in their judgment, appropriate for a high school audience. Parents filed suit following the superintendent's decision, but a district court concluded that the students' first amendment right of expression had not been abridged.[70] Appeal was taken to the Third Circuit Court of Appeals. The key to the appeals court's analysis was the fact that the play was an integral part of the school curriculum. The court therefore expressed reluctance to interfere with the decision of a school administrator. Noting that an unedited version of the play remained in the school library, the court concluded that there had been no limit on the access to ideas within the school.

Banning of Ideas. While courts may sometimes permit the removal of obscene materials from libraries, controversial ideas enjoy significant first amendment protection. Wisconsin Statute § 120.12(1) authorizes the school board to control and manage the property and affairs of the school district, which includes school libraries. This power is restricted only by other Wisconsin Statutes and constitutional limitations. Wisconsin Statute § 121.02(1)(h) requires schools to supply adequate library materials to "reflect the cultural diversity and pluralistic nature of American society." Courts may interpret this statute to mean schools may not divest themselves of all books concerning an unpopular ideology. In *Zykan v. Warsaw*

Community School Corporation, the Seventh Circuit ruled schools cannot use academic coercion to establish an ideology: "Nothing in the Constitution permits the courts to interfere with local educational discretion unless local authorities promote rigid and exclusive indoctrination rather than exercise their right to make controversial educational choices."[71]

If schools banned all books that did not agree with a particular religious creed, they would probably be in violation of the first amendment establishment clause. Schools cannot impose a particular ideology or religious orthodoxy on their students. Zykan suggests schools cannot eliminate a particular kind of inquiry or deprive students of all contact with the material. School authorities also cannot prohibit students from buying or reading a particular book. Under most circumstances, students should also be able to bring the book to school and discuss it.

Controversial ideas were at issue in a Minnesota case involving high school film censorship. A film version of "The Lottery," a short story by Shirley Jackson in which the citizens of a small town randomly select one person to be stoned to death each year, was shown to American literature students in Forest Lake, Minnesota. A parents' group claimed the film had an impact on students' religious and family values. The school board, after hearings, and against the recommendation of an advisory committee, voted to remove the film from the curriculum. A district court ruled that the board's objections had "religious overtones" and that the film and an accompanying educational "trailer" had been banned because of their "ideological content." This decision was then appealed to the Eighth Circuit Court of Appeals.[72]

Citing Pico and its imputed right for students to receive information, the appeals court concluded that the film had been withdrawn simply because the board objected to the ideas in the material. Because the board had refused to justify the removal, the court determined that the decision had a "chilling effect" on the free speech of students and teachers. Placing the burden on the board to explain its decision, the court decided that there had been no government interest expressed that would justify the interference with the students' right to receive information. Thus, while the court found the film was not "comforting," there was no justification for its removal solely because a majority of the board had found some parts of it offensive.

V. Summary.

Schools are sometimes the battleground for constitutional issues unresolved in the larger society. What constitutes an "obscene" book or an inflammatory pamphlet is very much in the eye of the beholder and whether, as the late Supreme Court

Justice William O. Douglas argued, the first amendment "covers the entire spectrum of ideas"[3] is still in dispute. Groups with strongly held positions on these issues, buttressed by philosophical or religious underpinnings, often advance their causes by seeking to change the contents of school libraries or modifying school policies and the curriculum. While school personnel cannot always avoid having their schools become the battleground for these disputes, there are steps which schools can take to reduce the likelihood of protracted litigation.

It is first necessary to realize that students have important free speech rights which cannot be abridged by school policies or procedures. These were discussed throughout this chapter. It is also obvious that hurried, ad hoc decisions made by a school administrator or school board members may later be regretted. Where free speech and expression interests are involved, careful consideration and counsel with school attorneys can save considerable embarassment or expense. The first step, then, is to realize when free speech or expression interests are present and to proceed cautiously.

Schools also need carefully considered, written policies on the central issues which were discussed in this chapter: book selection and removal, distribution of written materials, outside speakers, content of school publications, and student dress. Having such policies and procedures, making sure that they are designed to meet contemporary legal standards, and using them cautiously can go a long way in avoiding legal disputes. Anyone doubting this point should return to the cases discussed in this chapter and ask how many of them would have occurred had the school in question had such policies. Some of the cases could not have been avoided, given the depth of feeling which surrounds free speech issues. Most of them, however, could have been avoided, or fought on grounds more favorable to the defending school system.

NOTES

[1] The First Amendment of the United States Constitution says in part, "Congress shall make no law abridging the freedom of speech; or of the press; or the right of people peaceably to assemble." The Wisconsin Constitution, Article I, Section 3, states, "Every person may fully speak, write, and publish his sentiments on all subjects, being responsible for the abuse of that right, and no laws shall be passed to restrain or abridge the liberty of speech of the press."

[2] 393 U.S. 503 (1969).

[3] 393 U.S. 603 (1969).

[4] *Sword v. Fox*, 446 F.2d 1091 (4th Cir. 1971).

[5] *Lipp v. Morris*, 579 F.2d 834 (3rd Cir. 1978).

[6] *Fricke v. Lynch*, 491 F. Supp. 381 (D.R.I. 1980), *aff'd*, 627 F.2d 1088 (1st Cir. 1980).

[7] *United States v. O'Brien*, 391 U.S. at 377 (1968).

[8] *Butts v. Dallas Independent School Dist.*, 436 F.2d at 73 (5th Cir. 1971).

[9] *Fricke v. Lynch*, see fn. 6 *supra*.

[10] *Guzeck v. Drebus*, 431 F.2d 594 (6th Cir. 1970).

[11] *Hinze v. Superior Ct. of Marin Cty.*, 174 Cal. Rptr. 403 (Cal. Ct. App. 1981).

[12] *Butts v. Dallas Independent School Dist.*, 436 F.2d 731 (5th Cir. 1971).

[13] *Id.* at 732.

[14] *Fricke v. Lynch*, see fn. 6 *supra*.

[15] 491 F. Supp. at 887.

[16] *Gebert v. Hoffman*, 336 F. Supp. 694 (E.D. Pa. 1972).

[17] *Grayned v. City of Rockford*, 408 U.S. 104 (1972).

[18] *Id.* at 119.

[19] *Pickens v. Oklahoma Municipal Separate School Dist.*, 549 F.2d 433 (5th Cir. 1979).

[20] *Wilson v. Chancellor*, 418 F. Supp. 1358 (D. Or. 1976).

[21] *Vail v. Board of Educ. of Portsmouth School Dist.*, 354 F. Supp. 592 (D. N.H. 1973).

[22] *Arnold v. Carpenter*, 459 F.2d 939 (7th Cir. 1972).

[23] *Scott v. Board of Education, Hecksville*, 305 N.Y.S.2d 601 (N.Y. 1969).

[24] *Bannister v. Paradis*, 316 F. Supp. 185 (D. N.H. 1970).

[25] *Long v. Zopp*, 476 F.2d 180 (4th Cir. 1973).

[26] See *Bannister*, fn. 24 *supra*.

[27] *Wallace v. Ford*, 346 F. Supp. 156 (E.D. Ark. 1972).

[28] The First Amendment of the U.S. Constitution states, "Congress shall make no law abridging the freedom of the press." Article I, Section 3, of the Wisconsin Constitution states, "Every person may freely write and publish his sentiments on all subjects, being responsible for the abuse of that right, and no laws shall be passed to restrain or abridge the liberty of the press."

[29] See *Scoville v. Board of Educ.*, 425 F.2d 10 (7th Cir. 1970), *cert. denied*, 400 U.S. 826 (1970); *Panarella v. Birenbaum*, 32 N.Y.S. 2d 333 (N.Y. 1973); but see *Nicholson v. Board of Educ., Torrance Unified School Dist.*, 682 F.2d 858 (9th Cir. 1982).

[30] See *Eisner v. Stamford Bd. of Educ.*, 440 F.2d 803 (2d Cir. 1971); *Trachtman v. Anker*, 563 F.2d 512 (2d Cir. 1977), *cert. denied*, 435 U.S. 925 (1978).

[31] 393 U.S. 503 (1969).

[32] *Frasca v. Andres*, 463 F. Supp. 1043 (E.D.N.Y. 1979).

[33] *Reineke v. Cobb Cty. School Dist.*, 484 F. Supp. 1252 (N.D. Ga. 1980).

[34] *Scoville v. Board of Educ. of Joliet Township*, 425 F.2d 10 (7th Cir. 1970).

[35] *Dodd v. Rambis*, 535 F. Supp. 23 (S.D. Ind. 1981).

[36] *Shanley v. Northeast Independent School Dist.*, 462 F.2d 960 (5th Cir. 1972).

[37] *Id.* at 972.

[38] *Tracktman v. Anker*, 562 F.2d 512 (2d Cir. 1977), *cert. denied*, 425 U.S. 925 (1978).

[39] *Williams v. Spencer*, 622 F.2d 1200 (4th Cir. 1980).

[40] *Jacobs v. Board of Commissioners*, 490 F.2d 601 (7th Cir. 1973).

[41] *Fujishima v. Board of Educ.*, 460 F.2d 1355 (7th Cir. 1972).

[42] Wisconsin Statutes § 120.13(b) reads in part, "The school district administrator or any principal or teacher . . . may make rules...and may suspend a pupil . . . for conduct by the pupil while not under the supervision of a school authority which endangers the property, health or safety of others at school or under the supervision of a school authority."

[43] *Thomas v. Board of Educ., Granville Central School Dist.*, 607 F.2d 1043 (2d Cir. 1979), *cert. denied*, 444 U.S. 1081 (1980).

[44] 607 F.2d at 1052.

[45] *Joyner v. Whiting*, 477 F.2d 456 (4th Cir. 1973).

[46] *New York Times v. Sullivan*, 376 U.S. 254 (1964).

[47] Louis Fischer, David Schimmel, and Cynthia Kelley, *Teachers and the Law* (New York: Longmans, 1981), p. 133.

[48] *Frasca v. Andres*, 462 F. Supp. 1043 (E.D. N.Y. 1979).

[49] *Miller v. California*, 413 U.S. 15, at 24 (1972).

[50] *State v. Princess Cinema of Milwaukee, Inc.*, 280 N.W.2d 323, 96 Wis.2d 646 (Wis. 1980).

[51] *Thomas v. Board of Educ., Granville Central Dist.*, 607 F.2d 1043 (2nd Cir. 1979), *cert. denied*, 444 U.S. 1080 (1980).

[52] *Jacobs v. Board of School Commissioners*, 490 F.2d 601 (7th Cir. 1973).

[53] *Id.* at 610.

[54] *Reineke v. Cobb Cty. School Dist.*, 484 F. Supp. 1252 (N.D. Ga. 1980).

[55] 631 F.2d 1300 (7th Cir. 1980).

[56] *Id.* at 1308.

[57] *Pico v. Board of Educ., Island Trees Union Free School Dist.*, 474 F. Supp. 387 (E.D.N.Y. 1979), at 397.

[58] *Pico v. Board of Educ., Island Trees Union Free School Dist.*, 638 F.2d 404 (2d Cir. 1980).

[59] *Pico v. Board of Educ., Island Trees Union Free School Dist.*, 102 S. Ct. 2799.

[60] Id. at 2808; see also, *Johnson v. Stuart*, 702 F.2d 193 (9th Cir. 1983).

[61] *Id*. at 2814.

[62] *Id*. at 2817.

[63] *Id*. at 2821.

[64] *Id*. at 2823.

[65] *Sheck v. Baileyville School Comm*., 530 F. Supp. 679 (D. Me. 1982).

[66] *Salvail v. Nashua Bd. of Educ*., 469 F. Supp. 1269 (D. N.H. 1979), *Right to Read Defense Comm. of Chelsea v. School Comm. of the City of Chelsea*, 454 F. Supp. 703 (D. Mass. 1978), *Minarcini v. Strongsville City School Dist*., 541 F.2d 577 (6th Cir. 1979).

[67] *Zykan v. Warsaw Community School Corp*., 631 F2d 1300 (7th Cir. 1980).

[68] *Becknell v. Vergennes Union High School Bd*., 638 F.2d 438 (2nd Cir. 1980).

[69] *Id*. at 441.

[70] *Seyfried v. Walton*, 512 F. Supp. 235 (D. Del. 1981), *aff'd*, 668 F.2d 214 (3d Cir. 1981).

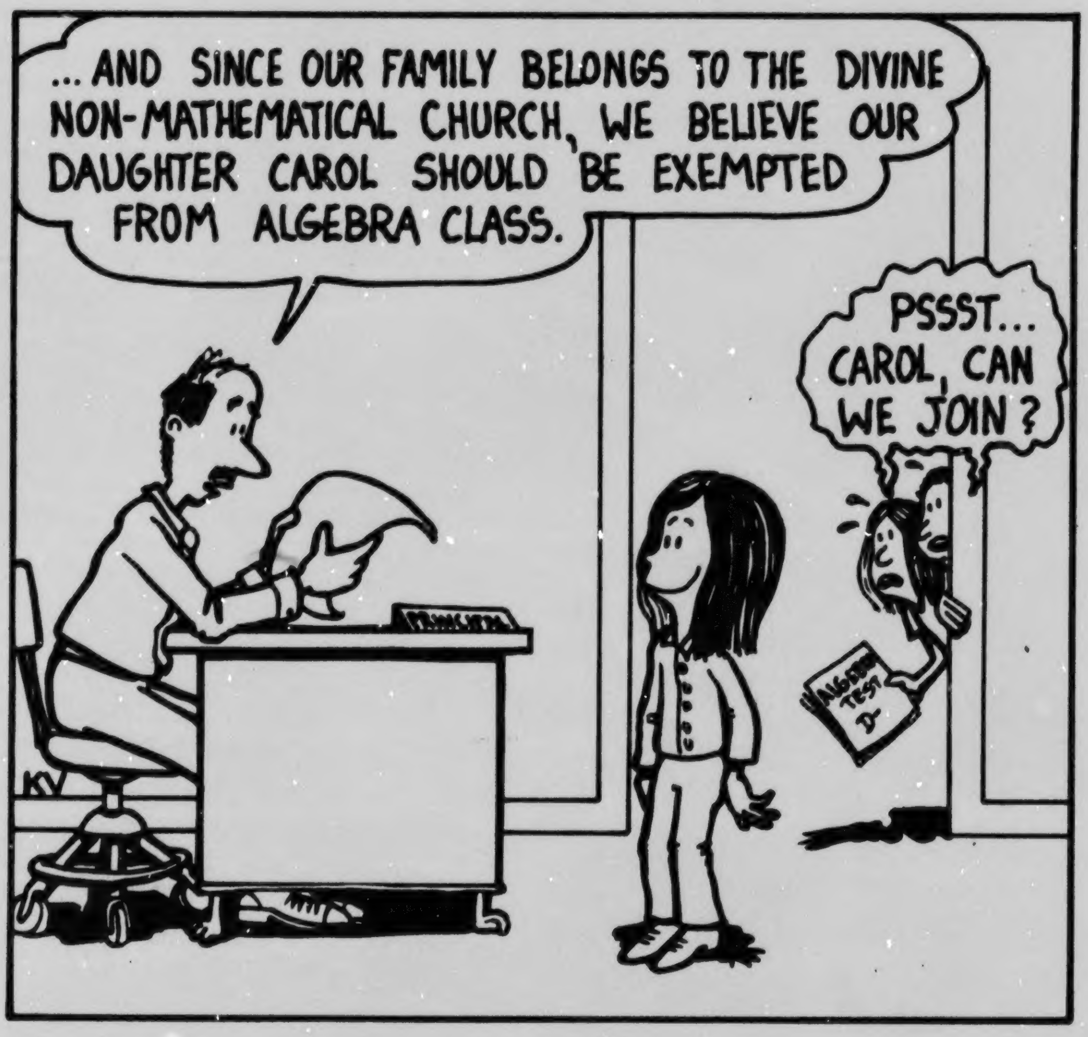
[71] *Zykan*, at 631.

[72] *Pratt v. Independent School Dist. No. 831, Forest Lake*, 670 F2d 771 (8th Cir. 1982).

[73] William O. Douglas, *Go East Young Man* (New York: Random House, 1974), at 292.

CHAPTER 3

RELIGION IN THE PUBLIC SCHOOLS


... AND SINCE OUR FAMILY BELONGS TO THE DIVINE NON-MATHEMATICAL CHURCH, WE BELIEVE OUR DAUGHTER CAROL SHOULD BE EXEMPTED FROM ALGEBRA CLASS.
PSSST... CAROL, CAN WE JOIN?
ALGEBRA TEST D-
KV

1. What tests do courts apply in deciding if a religious program or observance in the public schools violates students' first amendment rights?
2. Is silent prayer or meditation permitted as a substitute for more formal prayers?
3. Under what circumstances can the Bible or other religious works be used as part of the public school curriculum?
4. What state aid can be given to private or parochial schools?
5. What are the limits on observing religious holidays in the public schools?
6. Under what circumstances must a student be excused from compulsory attendance, or from specific courses, for religious reasons?

I. Constitutional Perspectives.

Both the First Amendment to the United States Constitution and Article 1, Section 18, of the Wisconsin Constitution guarantee freedom of religion.[1] While the words used may differ, "both the federal and state Constitutional provisions serve the same dual purpose of prohibiting the governmental establishment of religion and protecting the free exercise of religion."[2]

The prohibition against the establishment of religion by government agencies is based in the constitutional separation of church and state contained in the first amendment. Government facilities must be used so as to maintain a neutral stance toward religion. Thus schools may not teach religious ideals. Article 10, Section 3, of the Wisconsin Constitution declares "no sectarian instruction shall be allowed" in Wisconsin public schools. Wisconsin Statute § 39.02, Section 2, further requires, "the state superintendent shall . . . exclude all sectarian books and instruction from the public schools." Wisconsin, then, unlike most other states, has had a long tradition of not allowing prayer in schools, and United States Supreme Court decisions prohibiting school prayer, decided in the 1950s, had little impact in the state.

Both Wisconsin state courts and the United States Supreme Court have determined that in-school programs such as Bible reading and prayer recitation constitute government establishment of religion. The United States Supreme Court in Lemon v.

Kurtzman[3] formulated a tripartite test to evaluate whether challenged programs and laws unconstitutionally establish religion. In order to withstand challenge a program must:

1. reflect a secular legislative purpose (the activity must have a significant nonreligious purpose);
2. have a principal or primary effect which neither advances nor inhibits religion; and
3. not foster an excessive state entanglement with religion.

This chapter later will explain the meaning and application of this test through analysis of recent court cases.

We now turn to a discussion of first amendment religious freedom from the perspective of the individual. The right freely to exercise one's religious beliefs, which is protected by both the United States Constitution and the Wisconsin Constitution, applies to students within the school setting. Although the freedom to hold any religious belief is absolutely protected, the freedom to practice religion may be limited. A compelling state interest may warrant restricting a student's religious expression. In such cases, courts will usually balance the individual's religious interest against the importance of the state's interest. Courts examine alternatives which might achieve the state's objectives without affecting students' rights.

The United States Supreme Court has developed a three-step analysis to test whether state laws or programs unconstitutionally infringe upon students' free exercise of their religious beliefs. The test was formulated in Wisconsin v. Yoder,[4] a landmark case appealed from the Wisconsin Supreme Court:

1. Is the affected activity rooted in a legitimate and sincerely held religious belief?
2. Have the parties' free exercise of religion been burdened by the regulation or state action? What was the impact on their religious practices?
3. Does the state have a compelling interest in the regulation which justifies restricting the free exercise of religion?

The Wisconsin Supreme Court opinion in Yoder defined a "substantial burden" as "requiring persons to perform affirmative acts which are repugnant to their religion."[5] A "compelling state interest" was defined as "not just a general interest in the subject matter but the need to apply the regulation without exception to attain the purposes and objectives of the legislation."[6] This chapter will later demonstrate that other courts have applied this balancing test when confronted with free exercise of religion issues.

It is difficult for schools to develop policies concerning religious issues without either unconstitutionally establishing religion or affecting students' free exercise of their religious beliefs. In an attempt to keep religion out of the schools, the state may inadvertently restrict students' free exercise rights. Alternatively, policies which attempt to protect students' religious expression may advance religion and represent excessive state entanglement with religion. This conflict was detailed in Yoder:

> Authorities now recognize the free exercise clause and the establishment clause overlap, can conflict, and cannot always be squared on any strict theory of neutrality. The course of constitutional neutrality in this area cannot be an absolutely straight line; rigidity could well defeat the basic purpose of these provisions, which is to insure that no religion be sponsored or favored, none commanded, and none inhibited. The general principle deducible from the first amendment and all that has been said by the Court is this: that we will not tolerate either governmentally established religion or governmental interference with religion. Short of those expressly proscribed governmental acts there is room for play in the joints productive of a benevolent neutrality which will permit religious exercise to exist without sponsorship and without interference. Each value judgment under the religious clauses of the United States Constitution must therefore turn on whether particular acts in question are intended to establish or interfere with religious beliefs and practices.[7]

This chapter will explain court rulings on the most common religious freedom problems encountered in the school setting. Hopefully this analysis can be used as a predictive tool to develop school policies that are fair and constitutional.

II. Establishment of Religion.

Prayers in the public schools during school hours have been found unconstitutional as serving to establish religion. Prayer is judged inherently religious and thus fails the first step of the tripartite establishment test.[8] In other words, there is no significant non religious purpose in school prayer, as required in Lemon. In 1979, the Supreme Court of the United States again ruled on this question and found a broad policy requiring morning prayer unconstitutional.[9]

As attempts to introduce amendments to the United States Constitution permitting school prayer proceed on the national level, some school districts, especially in the southern part of the country, have sought to avoid clearly established legal principles by making prayer voluntary, causing prayer to occur outside regular school hours, reading prayers over school public address systems, or substituting meditation for formal prayers. These alternatives have not found favor with courts. In Engle v. Vitale,[10] the United States Supreme Court concluded that voluntary participation in public school observances does not free the activity from the Constitution's establishment clause. Voluntary classroom observances, under a variety of guises, still serve to advance religion, thus failing the Lemon test discussed earlier in this chapter. Moments of silence for prayer or meditation also have been found to have the primary effect of advancing religion and therefore have been struck down.[11] Prayers or Bible readings over school public address systems also have the effect of advancing religion and therefore are impermissible.[12]

Wisconsin Statute § 120.13, Section 19, allows religious organizations to use school property during nonschool hours if they pay reasonable fees and do not interfere with the "prime use of the school property."[13] Case law suggests that permission to use school property for prayer meetings before or after school would be denied.[14] In Brandon v. Board of Education of Guilderland,[15] for example, a New York district court used the tripartite establishment test to deny students access to school property to hold voluntary prayer meetings before school hours. Since the school would be contributing rent-free space, the court ruled that allowing religious meetings on school grounds would advance religion in violation of the second step of the tripartite test. It would also appear the state was officially sanctioning the religious activity, due to the proximity to the start of the school day. Excessive entanglement was expected because the school would have to supervise the meetings to make sure the attendance was voluntary and uncoerced. The students also claimed their right to free exercise of religion was restricted by denying prayer meetings on school grounds. The court rejected their argument because the state's interest in separation between church and state justified the restriction. The district court's ruling was upheld by the Second Circuit Court of Appeals.[16]

Prayers offered before student assemblies or other meetings have been rejected by courts for reasons similar to classroom prayer. Reasoning by courts in such cases is illustrated by the opinion of an Arizona district court which determined reciting prayers at assembly meetings was unconstitutional.[17] In applying the *Lemon* establishment test the court found such prayers have no secular purpose. Second, the primary effect of the prayer was to advance religion: "To an impressionable student, the mere appearance of secular involvement in religious activities might indicate the state supports a particular religious creed."[18] Finally, the court found there would be excessive school entanglement even though the meetings were planned and conducted by students. School officials would have the duty to supervise all activities on campus to make sure student participation in the prayer before their start remained voluntary. The voluntary nature of an assembly is immaterial; students in this case were forced to listen to the prayers or miss a major school function. The school board argued that denial of the assembly prayers violated the students' rights to the "free exercise" of their religion. The court ruled the students' religious expression was not truly burdened because they were free to worship before or after the school day anywhere off school grounds.

Religion in the School Curriculum. The constitutionality of Bible study in the public schools depends on the intent and purpose of the programs. A district court in Tennessee reviewed two Bible study programs in the city and county schools respectively.[19] The court judged the purpose of the city programs was to teach biblical literature, history, and social customs. The city program avoided religious instruction and indoctrination. Stories were placed in a historical frame and told without Bible readings. Therefore, the city Bible study did not violate the establishment clause of the first amendment because it had a secular purpose and its primary effect was not to advance religion. On the other hand, the county Bible lessons conveyed religious messages. Bible readings were chosen to teach Christian doctrine and ethics. The county program therefore unconstitutionally established religion in the public schools.

Attempts to require the teaching of biblical versions of evolution have occurred in recent years, as several state legislatures enacted legislation requiring the Genesis version of the earth's evolution to be taught equally with Darwinian theories. Requirements that biblical versions of evolution, called "creation science" by their proponents, be taught have been struck down by federal courts. In the best known of these cases, an attempt by proponents of "creation science" to require that the perspective be taught with equal prominence to evolution theories was rebuffed in Arkansas.[20] Plaintiffs in the case argued that the Arkansas statute violated both the establishment clause and the free speech clause of the first amendment as well as the due process clause of the fourteenth amendment. The district court's carefully worded opinion, however, decided the case on first amendment religious grounds and did not reach the other arguments. Noting that courts had an obligation to attach deference to legislative statements in establishment clause cases, in order to insure that the bill had a secular purpose, the district court turned to the origins of the Arkansas statute. Looking at the correspondence by the bill's author, the court found "a religious crusade, coupled with a desire to conceal the fact."[21] By attempting to introduce the biblical version of creation into the schools, the act was seeking to advance religion, thus failing the first part of the Lemon test. After observing that "a theory that is by its own terms dogmatic, absolutist and never subject to revision is not a scientific theory,"[22] the court found that creation science had neither scientific nor educational value and therefore had only the effect of advancing religion, thereby failing the second part of the test. The classroom monitoring required to assure compliance satisfied the court that there also was excessive governmental entanglement. Thus the court issued an injunction against the act, concluding, "No group, no matter how large or small, may use the organs of government, of which the public schools are the most conspicuous and influential, to foist its religious beliefs on others."[23]

The United States Supreme Court has ruled a statute permitting the posting of the Ten Commandments in every public classroom is unconstitutional, in violation of the establishment clause.[24] The court did not find a secular legislative purpose even though the statute required the following notation to appear on the posted Ten Commandments: "The secular application of the Ten Commandments is clearly seen in its adoption as the fundamental legal code of western civilization and the Common Law of the United States." The Court said that the Ten Commandments is a sacred text in the Jewish and Christian religions and an attached note cannot give them a secular identity. The Ten Commandments differ from Bible study because they concern the religious duties of believers such as "worshipping the Lord God alone." They cannot be used solely for historical and literary instruction. Private financing did not make the posting constitutional, because they were placed in a public facility. In a similar case a North Dakota district court conceded the Ten Commandments contained some secular material but ruled, "The state is not allowed to use religious means to serve secular ends where secular means would suffice."[25]

Under some circumstances even courses involving meditation can be found to violate the first amendment. A New Jersey federal court ruled a course in Transcendental Meditation (TM) was essentially religious and its adoption in the public schools violated the establishment clause.[26] The decision rested on what constitutes a religion. Proponents contended the TM course was a science and served secular purposes such as relieving stress.

However, TM, as taught in the New Jersey schools, was based on coming into contact with the "field of pure creative intelligence." The court ruled the "field" was equivalent to God or Supreme Beings of other religious sects. The TM course contained several ceremonies which the court said were religious. Each student was assigned a word to repeat while meditating. This "mantra" was compared to the prayers of more traditional religions. Since TM was held to be a religion, its use in the public schools failed the *Lemon* establishment test. The primary effect of the program was advancement of a religion. Though the TM course fulfilled some secular objectives, nonreligious means could have accomplished those objectives.

III. Programs in Private and Parochial Schools.

In general, public funds may not be used to support sectarian education. Programs which include shared resources between the public and parochial schools are often attacked because government funds are used to advance religion. Both the Wisconsin Constitution and the United States Constitution prohibit sponsorship, financial support, and active involvement of the government in religious activity. Article I, Section 18, of the Wisconsin Constitution specifically prohibits drawing from the treasury to benefit religious societies and seminaries. Courts, however, sometimes approve programs if the resources are used for purely secular objectives. Aid in the form of secular textbooks, transportation, diagnostic services, time-release programs, and tax exemptions have been judged valid. However, if continued surveillance is required to make sure funds are not misused, courts will often rule the program violates the first amendment establishment clause. Government monitoring of parochial schools represents undue entanglement with religion.

The United States Supreme Court has twice ruled that public schools may loan secular textbooks to students attending parochial schools.[27] The Court stressed that books must be lent directly to the students. Ownership must technically remain with the state so that public funds are not furnished to the parochial schools.

In addition to textbooks, the Supreme Court has upheld other forms of aid to parochial schools:

> A state may provide church-related schools with secular, neutral, or nonideological services, facilities, or materials. Bus transportation, school lunches, public health services, and secular textbooks supplied in common to all students do not offend the first amendment establishment clause."[28]

The Court in Wolman v. Walter specifically found expenditure of public funds for standardized tests and diagnostic services constitutional.

The Court has distinguished between diagnostic services such as vision and hearing examinations and therapeutic services such as counseling, guidance, and remedial classes. In Meek v. Pettinger and Wolman the Court ruled diagnostic services could be offered to parochial schools on the private school grounds. However, therapeutic services must be held in some religiously neutral spot so that practitioners will not be influenced by the atmosphere of the school and unconstitutionally advance religious ideology.

The Court in Wolman found aid to parochial schools for field trip transportation and non-textbook instructional materials unconstitutional. The Court reasoned it would be too easy for the schools to use the funds and materials to advance their religious ideology and policing the aid would involve state entanglement in religion. Wisconsin Statutes § 121.54(7)(g)(1) requires parochial schools to charge for field trip transporation if undertaken using public school vehicles.

In 1978-79 the Department of Public Instruction signed a memoradum of understanding with what is now the federal Department of Education to redefine the term "textbook." Under the expanded definition, textbooks include multi-media materials, equipment, and aparatus. The Wisconsin definition runs counter to Wolman and other cases in this area.

Although the Supreme Court has not ruled on the question, public schools probably can not lease classrooms from parochial schools without violating the United States Constitution and the Wisconsin Constitution.[29] A Michigan district court ruled that a dual enrollment plan, in which a public school leased a portion of a parochial school building, violated the establishment clause.[30] The court used the tripartite Lemon test. The program met the first part, the secular purpose, because the goal of the program was to avoid overcrowding in the public schools. However, the court said the primary effect of leasing rooms in the parochial school building was to advance religion. The parochial school could not have existed without the state's financial aid in the form of rent. The court also found undue state entanglement in religion. The public school "Annex" was attended solely by students transferring from the parochial school. Because of the complete identity of the student bodies, the physical proximity of the classes, and religious atmosphere of the school, there was a good chance religious teaching would infiltrate into the public school classrooms. Continued monitoring would be necessary to make sure the public and private school spheres were kept separate. The court said state surveillance of a parochial school setting might constitute unconstitutional entanglement in and of itself. Although the Constitution prohibits public schools from providing educational services to parochial schools on public school premises, the Wisconsin Attorney General has suggested funds may be spent through a dual enrollment program if the private and public school campuses are separate.[31]

Observance of Religious Holidays. Courts have generally permitted the recognition of religious holidays within the public schools. In a case which carefully reviewed this issue, the Eighth Circuit Court of Appeals ruled that the observance of holidays which have both a religious and secular significance does not violate the first amendment establishment clause.[32] The court applied the Lemon tripartite test to the school board's guidelines concerning holiday activities. First, it found the purpose of the guidelines was to ensure that religious exercises remained out of school holiday activities. The school board's stated concern was to advance knowledge of cultural and religious heritage. Therefore the holiday guidelines reflected a secular legislative purpose. Second, the court did not find that the effect of the guidelines was to advance or inhibit religion. The schools' holiday performances could be seen as part of an objective study of religion. The first amendment, then, does not forbid all mention of religion in the public schools. However, the court did caution against performing religious ceremonies and labeling them "study" to avoid establishment problems. Finally, the court found the school board free from excessive entanglement in religion. The challenged guidelines were an effort to remove religious involvement from holiday programming. The court emphasized that its decision could not be applied to all public school programs which include religious themes. Each situation must be evaluated in terms of its purpose, effect, and state involvement in religion. Guidelines developed by local school boards which delineate secular goals and procedures for avoiding religious effect and entanglement will probably survive constitutional attack.

Time-Release Programs. In 1972, the Wisconsin Constitution, Article 10, Section 3, was amended to allow the legislature to "authorize the release of students during regular school hours for religious instruction outside the district schools." Section § 118.155 of the Wisconsin Statutes permits pupils to be absent from school for 60 to 180 minutes per week to attend religion classes if they have written parental permission. The instruction must be held outside the public school building, transportation cannot be provided by the public schools, and attendance records in religion classes must be reported to the public schools each month. In 1975, the Wisconsin Supreme Court ruled that the Wisconsin time-release program does not violate the First Amendment of the United States Constitution.[33]

A program nearly identical to Wisconsin's time-release statute was found constitutional by the United States Supreme Court.[34] The Court stressed that religious instruction cannot be on public school grounds and cannot be supported by public funds. The court warned against state entanglement in religion:

> Government may not finance religious groups nor undertake religious instruction nor blend secular and sectarian education nor use secular institutions to force one or some religion on any person. But we find no constitutional requirement which makes it necessary for government to be hostile to religion and to throw its weight against efforts to widen the effective scope of religious influences.[35]

The court recognized that the separation of church and state does not mean public institutions cannot make adjustments in their schedules to accommodate people's religious needs.

More recently, a district court in Utah found a time-release program did not violate the establishment clause,[36] but ruled some of its particular features were unconstitutional. A review of the case demonstrates the complexity of time-release issues. The Utah program allowed students to be released one class period a day to go off campus and participate in religious instruction. The state granted credit to the students for the religion class and allowed it to fulfill minimum-hour attendance requirements. The court found this provision advanced religion and therefore violated the establishment clause. In order to offer public school credit the classes would have to teach religion in a historical or literary sense. Monitoring by school officials to ensure the classes passed constitutional muster would lead to excessive entanglement in parochial school business by state officials. The first amendment was further violated by the public schools' receipt of state funds based on students' participation in the religion classes. The use of public school aides to pick up attendance slips from the parochial school violated the establishment clause, because state funds were being used to aid the church. Other accommodations between the two schools, such as allowing parochial school teachers to eat in the public school cafeteria, an interschool bell and intercom system, and volunteer help from the parochial school were found not to violate the first amendment.

Some students have argued that time-release programs violate their right to practice their religion freely. They contend the social pressure to participate in these programs burdens their religious freedom. Since the courts in Holt, Zorach, and Lanner did not find any state coercion on the nonparticipating students, judges ruled the time-release programs did not violate the free exercise clause.

IV. Free Exercise of Religion.

Previous sections of this chapter have emphasized what schools can and can not do in the areas of prayer, curriculum involving religious themes, and released-time programs. This section focuses on students, discussing the ways in which the first amendment has been interpreted to protect the individual religious freedoms of students. First among these rights is the choice to attend a private or parochial school.

In 1925, the United States Supreme Court established the right of parents to choose the kind of school they wished their children to attend.[37] In Pierce v. Society of Sisters, an Oregon statute which required public school attendance for all children six to eighteen years was found unconstitutional. The Supreme Court stressed that it is the parents' right to direct the education and growth of their children. The opinion warned that requiring public school attendance could destroy diversity of thought and limit individual freedoms.

The Court in Pierce upheld a state's power to regulate all schools within its boundaries, public or private. Laws may require that all children of appropriate age attend some school. States may set reasonable standards for teacher competency and minimum curriculum requirements. Building regulations which ensure the health and safety of students are also constitutional. No school is exempt from "reasonable" state regulation. What constitutes "reasonable" regulation is sometimes litigated, as the discussion which follows demonstrates.

Compulsory attendance laws can seldom be avoided in the face of claims that they violate the tenets of a student's religion. The United States Supreme Court made an exception in Wisconsin v. Yoder.[38] Wisconsin Amish children were allowed to leave school at the end of the eighth grade, although the Wisconsin compulsory attendance law required school attendance until age 16. As previously discussed, the Amish successfully argued that school attendance burdened the free exercise of their religion.

The Yoder decision is very narrowly applied and courts elsewhere have been reluctant to expand its holdings. Other groups wishing to avoid school attendance will have to prove their objections are based on well established religious belief. For example, a 1978 Wisconsin decision denied a woman the right to withdraw her eight children from school on religious grounds.[39] She claimed the teachings of the Basic Bible Church conflicted with educational goals. However, other members of the church were not opposed to education, and many sent their children to public schools. The court found her objections were not "rooted in a legitimate and sincerely-held religious belief."

Since her beliefs were personal and philosophical rather than religious, they were not protected by the free exercise clause of the first amendment. The court noted that giving first amendment protection to ideological differences would allow individual parents to withdraw children from school whenever they objected to all or part of the subject matter taught. The Wisconsin compulsory school system would be effectively destroyed.

In other states, litigation frequently results because private schools are required to employ certified teachers.[40] This is not a requirement in Wisconsin and has encouraged the growth of private schools. Wisconsin Statute § 115.28(b) states that private schools are not obligated to employ only licensed or certified teachers. Teachers may use their private school teaching experience to fulfill certification requirements, if the state superintendent finds the school offered an adequate educational program.

Certain school activities and courses are offensive to particular religious beliefs or contrary to the religious practice of some sects. The new wave of fundamentalism has created a challenge to almost every aspect of the school's curriculum. Sex education, coed physical education, dance, and ROTC have all been attacked on religious grounds. Wisconsin Statute § 118.01 describes the curriculum requirement for all Wisconsin elementary schools. The statute contains exemptions for certain courses. There is no guarantee, however, that further exemptions for religious reasons would not be granted by a federal court. Courts have applied the Yoder three-step test to determine whether compulsory class participation abridged a student's constitutional right to religious freedom.

Wisconsin Statute § 118.01(3) requires Wisconsin schools to provide physical instruction and training in physical education for all their pupils. The section does not contain any exemption procedures. However, an Illinois district court granted an exemption from physical education classes because the gym attire offended the student's religious practices.[41] To comply with Title IX, Illinois regulations required participation in coeducational physical education classes and did not excuse students for religious reasons. In examining this requirement, the Illinois court applied the Yoder test. First, the student's objections were judged to be rooted in a legitimate religious belief. The student bringing the suit was a member of the Pentecostal religion, in which modest dress is an integral part of the church doctrine. Second, the student's religious freedom was burdened because he was forced into close contact with members of the opposite sex wearing "immodest" clothing. This violated a basic tenet of the Pentecostal religion, which forbids putting oneself in a position where there is temptation to lust after another person.

Finally, the court found that the student's religious rights outweighed the state's interest in providing physical education. The court stressed that the state must use the least restrictive means to achieve its objectives. It considered alternatives to the regulation which would not have burdened the student's religious practice but would have served the state's interests. Sex-segregated classes, individual instruction, or exemption from class would all have been appropriate.

A federal appeals court granted an exemption from ROTC training to a student who was a "conscientious objector."[42] A state regulation required one year of physical education or ROTC training in order to earn a diploma. The student's school did not offer the physical education option, although the facilities were available. In applying the Yoder test, the school conceded that the student's objections were based on sincere religious beliefs. The court then found the regulation burdened the student's religious freedom. He was forced to engage in military training, contrary to his religious beliefs, or to give up his public education. Finally, the state's interest could have been served in a regular physical education class without disturbing the student's first amendment rights.

Wisconsin Statute § 118.01 (2) allows exemptions from physiology and hygiene classes if parents file a written objection with the teacher. Sex education classes have been attacked on first amendment grounds even when exemptions are permitted. Parents argue their children are coerced into participation against their religious beliefs through informal pressure.

New Jersey parents challenged a regulation of the State Board of Education that each local district have a family life education program in public elementary and secondary schools.[43] The rule requires each New Jersey public school student to receive instruction in all aspects of the family life program, including sex education, unless a parent or guardian finds a part of the program objectionable. The student is then excused from that portion. Parents filing the suit claimed the program violated their first amendment rights because students would be exposed to attitudes, goals, and values contrary to their own and to those of their parents and would "thereby be inhibited in their practice of religion."[44]

The New Jersey Supreme Court concluded that there could be no violation of the free exercise clause where participation was voluntary, even if it was sometimes difficult for a student to leave the classroom while the objectionable material was being taught. To eliminate all school curriculum that might offend some group, the court reasoned, would make that group's beliefs state policy, thereby violating the establishment clause.

The court also addressed the appellant's claim that the program established secularism as a religion, thereby violating the establishment clause. Finding no merit in this argument, the court concluded that the program was indeed secular and was neutral in its effect on religion, neither advancing nor prohibiting the discussion of religion in the classroom. This, the court reasoned, was what Lemon had envisioned should be the treatment of subjects that had a moral or spiritual component. Thus the program was upheld by the unanimous court, which also rejected assorted procedural claims about the rules' adoption that were raised by the appellants. In rejecting the secularism-as-religion arguments, the New Jersey court followed in the steps of other state courts which have considered and rejected similar arguments in recent years.

A similar program in San Mateo County was attacked as establishing a state religion.[45] Parents argued the sex education class advanced religion because it "established new or different religious and spiritual practices and beliefs." They contended matters of morality, family life, and reproduction were essentially religious and should be taught at home or in the church, but not at school. As in the New Jersey case just discussed, the court ruled the program was not religious in nature and involved general educational themes and public health. The parents' complaint was dismissed.

Courts have granted exemptions to students who did not wish to participate in dance classes, watch movies, or play cards for religious reasons.[46] The determining factor in such cases is whether objections are based on sincere religious beliefs. The state's interest in these activities is deemed minimal, so that any showing of burden on religious freedom generally will warrant an exemption.

Immunization. Wisconsin Statute § 140.05(c) allows individuals to waive the immunization requirement if the parents object for reasons of health, religion, or personal conviction. Parental objections must be submitted to the school in writing, and schools must inform parents in writing of their right to object.

V. Summary.

First amendment freedom of religion issues contain two sometimes conflicting elements. First is the obligation of government, in our case school systems, to respect the right of individuals to be free from the imposition of unwanted religious doctrines. Second is the obligation of government to permit the free exercise of sincerely held religious beliefs. The tension between these two perspectives was present at the time Congress debated the first amendment. Congressman James Madison, for example, on June 8, 1789, urged that the amendment be worded, "The civil rights of none shall be abridged on account of religious belief or worship. . . ." A week later Madison argued the wording should be, "Congress should not establish a religion and enforce the legal observation of it by law, nor compel men to worship God in any manner contrary to their conscience."[47] The final first amendment contained protection both *for* religious expression and *against* government participation in the advancement of religion. Courts have struggled continuously to protect both rights.

As agents of government, school systems also feel the pressure from the competing clauses in the first amendment. School policies must walk the fine line between allowing students to exercise their rights while not forcing other students into unwanted contact with religious doctrines. As with other issues arising from amendments to the United States Constitution or the State of Wisconsin Constitution, policies involving the exercise of religion should be carefully considered. While the prohibition on school prayer is clear, borderline questions such as school clubs with religious activities are less certain. As this chapter has detailed, not every claim for special treatment based on religious preference must be honored. Some, however, must be recognized.

In a sense, the first amendment language was a political compromise and, as with all compromises involving complex principles, unresolved issues will continue to be discussed and disputed. This may be healthy for the republic, if not for the school systems directly involved in freedom of religion litigation.

NOTES

[1] The First Amendment of the United States Constitution reads in part, "Congress shall pass no law respecting an establishment of religion, or prohibiting the free exercise thereof. . . ." Article 1, Section 18, of the Wisconsin Constitution states, "The right of every man to worship almighty God according to the dictates of his own conscience shall never be infringed; nor shall any man be compelled to attend, erect, or support any place of worship, or to maintain any ministry against his consent; nor shall any control of, or interference with, the rights of conscience be permitted, or any preference be given by law to any religious establishment or modes of worship; nor shall any money be drawn from the treasury for the benefit of religious societies, or religious or theological seminaries."

[2] *Holt v. Thompson*, 225 N.W.2d 678 (1975), at 687.

[3] *Lemon v. Kurtzman*, 403 U.S. 602 (1971), at 612-613.

[4] 406 U.S. 205 (1972).

[5] *State v. Yoder*, 49 Wis.2d 430 (1970), at 437.

[6] *Id.*, at 438.

[7] *Id.*, at 444.

[8] See *School Dist. of Abington Township v. Schempp*, 374 U.S. 203 (1963); *Jaffree v. Wallace*, 705 F.2d 1528 (11th Cir. 1983); *Kent v. Commissioner of Educ.*, 402 N.E.2d 1340 (Mass. App. 1980).

[9] *Meltzer v. Board of Pub. Instruction of Orange Cty., Florida*, 439 U.S. 1089 (1979).

[10] 3780 U.S. 421 (1962).

[11] See *Duffy v. Las Cruces Pub. Schools*, 557 F. Supp. 1013 (D. N.M. 1983); *Beck v. McElrath*, 548 F. Supp. 1161 (M.D. Tenn. 1982) and *Opinions of the Justices to the House*, 440 N.E.2d 1159 (Mass. 1982) and the cases cited therein.

[12] *Karen B. v. Treen*, 653 F.2d 897 (5th Cir. 1981).

[13] If school space is rented on weekends to community groups, churches have the opportunity to rent. See *Country Hills Christian Church v. United School Dist. No. 512*, 560 F. Supp. 1207 (D. Kan. 1983).

[14] *Lubbock Civil Liberties Union v. Lubbock Ind. School Dist.*, 669 F.2d 1038 (5th Cir. 1982), *Johnson v. Huntington Beach Union High School Dist.*, 137 Cal. Rptr. 43 (Cal. App. 1977), *cert. denied*, 434 U.S. 988 (1977) and *Trietley v. Board of Educ. of the City of Buffalo*, 409 N.Y.S.2d 912 (N.Y. App. 1978).

[15] 635 F. Supp. 971 (N.D.N.Y. 1980).

[16] *Brandon v. Board of Educ. of Guilderland Cent. School Dist.*, 635 F.2d 971 (2d Cir. 1981).

[17] *Collins v. Chandler Unified School Dist.*, 470 F.Supp. 959 (D. Ariz. 1980), *aff'd*, 644 F.2d 759 (9th Cir. 1981).

[18] *Id.*, at 963.

[19] *Wiley v. Franklin*, 497 F. Supp. 390 (E.D. Tenn. 1980).

[20] *McLean v. Arkansas Bd. of Educ.*, 529 F. Supp. 1255 (E.D. Ark. 1982).

[21] *Id.*, at 1261.

[22] *Id.*, at 1269.

[23] *Id.*, at 1274.

[24] *Stone v. Graham*, 449 U.S. 39 (1980).

[25] *Ring v. Grand Forks Public School Dist. No. 1*, 483 F. Supp. 272 (D. N.D. 1980), at 274.

[26] *Malnak v. Yogi*, 440 F. Supp. 1284 (D. N.J. 1977).

[27] *Wolman v. Walter*, 433 U.S. 229 (1977) and *Meek v. Pettinger*, 421 U.S. 349 (1975).

[28] *Wolman*, at 242.

[29] See 67 *Op. Wis. Att'y Gen*. 283 (Dec. 12, 1978).

[30] *Americans United for Separation of Church and State v. School Dist. of the City of Grand Rapids*, 485 F. Supp. 432 (W.D. Mich. 1980) and 546 F. Supp. 1071 (W.D. Mich. 1982).

[31] 64 *Op. Wis. Att'y Gen*. 139 (August 5, 1975).

[32] *Florey v. Sioux Falls School Dist.*, 619 F.2d 1311 (8th Cir. 1980).

[33] *Holt v. Thompson*, 66 Wis.2d 659 (Wis. 1975).

[34] *Zorach v. Clausen*, 343 U.S. 306 (1952).

[35] *Id.*, at 314.

[36] *Lanner v. Wimmer*, 463 F. Supp. 867 (N.D. Utah 1978).

[37] *Pierce v. Society of Sisters*, 268 U.S. 510 (1925).

[38] 406 U.S. 205 (1972).

[39] *State v. Kasuboski*, 275 N.W.2d 101 (Wis. App. 1978).

[40] See *Bangor Baptist Church v. State of Maine*, 549 F. Supp. 1208 (D.Me. 1982) and *State of West Virginia v. Riddle*, 285 S.E.2d 359 (W.Va. 1981).

[41] *Moody v. Cronin*, 484 F. Supp. 270 (C.D. Ill. 1979).

[42] *Spence v. Bailey*, 465 F.2d 797 (6th Cir. 1972).

[43] *Smith v. Ricci*, 446 A.2d 501 (N.J. 1982).

[44] *Id.*, at 505.

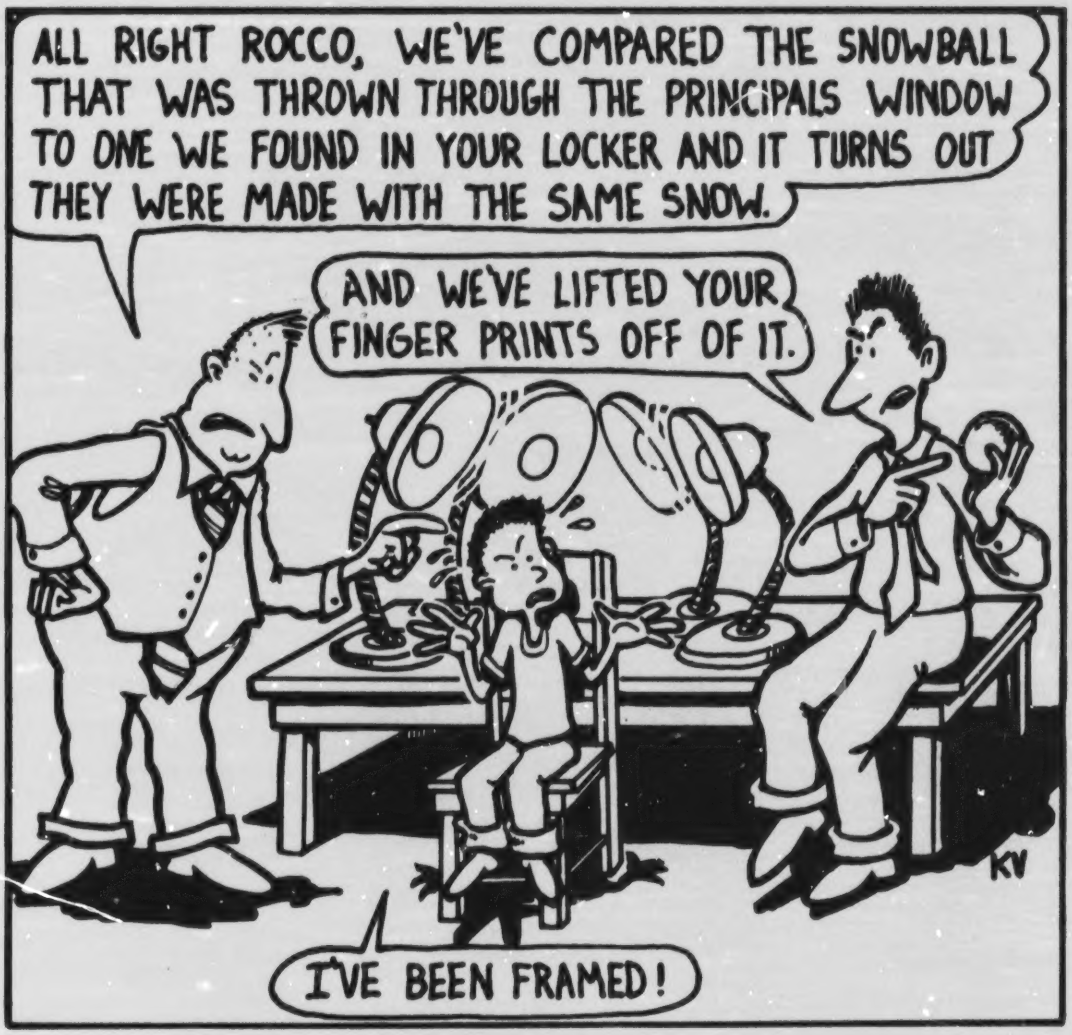
[45] *Citizens for Parental Rights v. San Mateo County Bd. of Ed.*, 124 Cal. Rptr. 68 (Cal. App. 1975).

[46] *Hardwick v. Board of School Trustees of Fruitridge School Dist., Sacramento Co.*, 205 P. 48 (Cal. App. 1921).

[47] The Annals of Congress, June 8, 1789 and June 15, 1789, cited by Herbert M. Kliebard, *Religion and Eduction in America: A Documentary History* (Scranton, Pa.: International Textbook Company, 1969), at 59-60.

CHAPTER 4

SEARCH AND SEIZURE


ALL RIGHT ROCCO, WE'VE COMPARED THE SNOWBALL THAT WAS THROWN THROUGH THE PRINCIPALS WINDOW TO ONE WE FOUND IN YOUR LOCKER AND IT TURNS OUT THEY WERE MADE WITH THE SAME SNOW.
AND WE'VE LIFTED YOUR FINGER PRINTS OFF OF IT.
I'VE BEEN FRAMED!
KV

1. Do school teachers and administrators act as government agents when they search students?
2. Can contraband seized in school searches be used in court proceedings?
3. When can school personnel search students without a warrant? When should a warrant be obtained?
4. Can students be suspended or expelled using evidence from a search?
5. When can student lockers be searched? When can student cars be searched?
6. Can sniff dogs be used in blanket searches of students?
7. Can school personnel conduct strip searches of students?

I. The Reasonable Cause Standard.

School personnel are sometimes involved in situations, generally involving suspected drug use, which result in a desire to search students or their possessions, including lockers and automobiles. These searches often result in litigation because school officials sometimes act without fully considering the legal implications of searches and because the law in this area is not fully settled. First, a sketch of constitutional issues is necessary. Searches present a variety of issues related to the Fourth Amendment of the United States Constitution. Fourth amendment issues are not raised in all school searches, however, and are most important when the search results in criminal prosecution or expulsion. The fourth amendment prohibits unreasonable searches:

> The right of people to be secure in their persons, houses, papers, and effects, against unreasonable searches and seizures, shall not be violated, and no warrant shall issue, but upon probable cause supported by oath or affirmation and particularly describing the place to be searched and the persons or things seized.

The amendment regulates searches by government agents.[1] It is clear that school administrators and teachers are covered by the amendment, because their duties flow from school boards whose powers, in turn, are derived from state statutes.[2] Thus school personnel are government agents. The right to be secure from unreasonable searches applies to juveniles as well as adults,[3] and is applicable in state court proceedings as well as those initiated in the federal court system.[4]

Evidence taken in an illegal search cannot be used in a subsequent criminal proceeding. This is known as the "exclusionary rule," and it provides a strong incentive to law enforcement personnel to conduct proper searches. Except in certain limited cases, a search is "unreasonable" if it is not authorized by a valid search warrant.[5] One exception to the warrant requirement involves "reasonable suspicion" that an individual is carrying a firearm. Under such situations, the Supreme Court has held that the individual can be stopped and frisked.[6] Different standards apply to school searches, however, so long as the searches do not lead to criminal proceedings.

Courts have generally held that "reasonable suspicion," rather than the more rigorous "probable cause" standard contained in the amendment, can be employed by school officials in searches related to school discipline. A Wisconsin appeals court illustrated this point in the case, *In the Interest of L.L.*[7] L.L. had previously been in possession of razor blades and a knife in school; therefore the teacher who thought he saw a weapon in the student's pocket had sufficient reason to conduct the search. The fact that the search subsequently uncovered marijuana did not affect the reasonableness of the search, according to the court.[8] In this case, the court allowed the search evidence to be used in juvenile proceedings undertaken against the student. As a general rule, once the results of a school search are used in criminal proceedings against a student, higher standards of probable cause apply to the search, and evidence may be excluded if it was improperly obtained. Higher standards might also apply were the evidence to be used in school expulsion proceedings.[9]

A 1977 New York federal court decision is frequently cited by other courts in cases involving the reasonableness of school searches.[10] The following factors were used by the New York court in determining the reasonableness of a search: the student's age; the student's history and record in school; the seriousness and prevalence of the problem to which the search is directed; the exigency requiring an immediate warrantless search; the reliability of the information leading to the search; and the school officials' prior experience with the student. Calling the police and obtaining a warrant are clearly the best method of dealing with problems for which a search may be required and the law has been broken. Considering the criteria for reasonableness when the situation may require an immediate search is one way of avoiding unnecessary litigation.

In general, the standards for a search vary depending on what is being searched. The fourth amendment applies principally to people, though there may be an "expectation" that other property is free from random searches.[11] School lockers, which are the property of the school temporarily under the control of a student, can more readily be searched than possessions carried by students, such as pocketbooks. An individual's body enjoys the greatest protection of all, and warrantless strip searches or the use of sniff dogs to detect contraband on students raise significant fourth amendment issues and an almost certainty of legal action.

This chapter more fully discusses the principles introduced thus far, looking at the exclusionary rule and the standard of "reasonable" as distinct from "probable" cause in school searches. This will be done by looking at the most common forms of searches--student lockers, cars, possessions, and students themselves.

II. Lockers, Desks, and Automobiles.

Lockers and Desks. Lockers and desks are controlled by the school, and courts have almost universally held that students have little expectation of privacy when school officials have reason to search them. While utterly random searches of lockers might be challenged, a wave of drug use at a school or the potential that weapons are stored in lockers probably would justify the search of lockers. This is particularly likely if schools have written policies regarding locker use which notify students that lockers are school property and may be searched. Cases from outside Wisconsin will illustrate these points.

The Tenth Circuit Court of Appeals has found that the use of sniff dogs to detect contraband in lockers was not unconstitutional.[12] A random search of lockers detected marijuana in a locker which subsequently was searched. The discovery was used in school disciplinary proceedings, and the student was transferred to another school. No criminal charges were sought, and the appeals court found the search was reasonable.

In a California case, school officials acted on a tip and discovered marijuana in a locker.[13] Use of such information made the search reasonable, the state appeals court decided. In a New York case, a locker search by police was upheld, though it was conducted with a defective warrant, on the grounds that school officials could open lockers without the consent of students.[14]

Student Automobiles. The Supreme Court has held that the expectation of privacy in a vehicle is less than that which would attach to one's home or person.[15] Warrantless searches of cars, on probable cause, have also been justified by the Court because vehicles are easily moved before warrants are obtained.[16] Car searches are becoming more important in school cases with the advent of sniff dogs. Prior to their use, school officials had little way of searching automobiles. Concern about "reasonable suspicion," however, remains a factor in all car search cases. Finding materials in "open view," however, does not constitute a search, as a recent Florida case involving the removal of drug paraphernalia from a car demonstrates.[17]

In a Texas case, *Jones v. Latexo Independent School District*,[18] a district court found the use of sniff dogs to search cars to be in violation of the fourth amendment. The search was random and resulted in disciplinary action against three students when contraband drug paraphernalia were discovered. Under the penalty given the students, one found it impossible to graduate on schedule. In looking at the search, the court decided that, since the students had no access to their cars during the day, the school had a minimal interest in the contents of the cars. The court ordered the penalties rescinded.

In another Texas case, *Horton v. Goose Creek*,[19] the United States Supreme Court let stand a Fifth Circuit Court of Appeals decision upholding the use of dogs to sniff cars and lockers, but not students. Using *United States v. Goldstein*,[20] the appeals court ruled that the sniffing of unattended cars and lockers in public areas did not constitute a search. The sniffing of students, on the other hand, was seen differently, as will be discussed below. The *Horton v. Goose Creek* ruling appears to have settled the car search question in favor of permitting such searches, though totally random searches in Wisconsin were rejected in *In the Interest of L.L.*[21] Issuance of a warrant, of course, remains the most prudent course in these cases.

III. Searches of Students.

As the case *In the Interest of L.L.* demonstrated, searches of students based on reasonable suspicion are permitted if the tests for reasonableness discussed above are met. Courts have found, for example, that students can be asked to empty their pockets when a principal has received a tip that the student is selling drugs.[22] In a State of Washington case with similar facts, a search which led to a six-month jail sentence was found reasonable when the call to the principal explained that the student was selling "speed."[23] A search was also found reasonable when a principal patted a student's pocket and found a gun, again acting on information received from another student.[24]

In Kentucky, a girl was suspended for failing to allow school officials to search her purse for "party poppers," a harmless version of the firecracker. Small, legal poppers had caused disruptions in the school, and the student had been implicated as their source. The district court ruled that the penalty was reasonable and that schools did not have to seek a warrant for every minor disciplinary action.[25] Although not accepting the doctrine of *in loco parentis* as justification for every search, the court found that the suspension did not violate the fourth amendment.

In a Maryland case, an appeals court ruled that a search of a student was unreasonable when the student was merely seen "hanging around" in an area in which a theft had occurred.[26] When evidence of wrongdoing was uncovered, criminal proceedings resulted in this case. Therefore, the exclusionary rule was used and, under that standard, the student's conviction was overturned. A Louisiana court reached the same conclusion.[27] The student there was convicted of marijuana possession after his gym teacher opened his wallet and discovered the marijuana during a physical education class. The state supreme court found the search unreasonable, given the absence of any cause to search.

Sniff Dogs. As already noted, the Fifth Circuit Court of Appeals upheld the use of sniff dogs to detect drugs in cars and lockers.[28] The appeals court said, however, that the search of a student by dogs was an entirely different question, concluding, "The students' persons certainly are not the subject of lowered expectations of privacy."[29] The court held that the degree of personal intrusiveness involved in the canine sniffing of a student brought such searches under the protection of the fourth amendment. Without individual suspicion, the goal of reducing drug and alcohol abuse in school was not found to be adequate cause for the search. The case was remanded to the district court to determine whether or not the dogs were reasonably reliable in their identifications of possible drug sources.[30]

The findings in *Horton* and *Jones*, both of which prohibit the use of dogs in blanket searches, run counter to a decision in the Seventh Circuit, *Doe v. Renfrow*.[31] In *Doe*, a junior high school student was strip searched by a police officer after a sniff dog indicated contraband by alerting in her presence. It was later determined that the student had been playing with her dog at home prior to the incident. The dog was in heat and this may have caused the sniff dog to alert. The student claimed a denial of constitutional rights and sought declaratory relief and damages under 42 U.S.C. §§ 1983 and 1985(3).

While finding the strip search invalid, the district court approved the blanket sniffing of students, concluding that it was not a search and that school officials had acted in accordance with the *in loco parentis* doctrine and had reasonable cause to believe that contraband would be found. The court also said that school officials enjoyed a qualified good faith immunity from the damage claims. The Seventh Circuit Court of Appeals affirmed all but the immunity holding. As with Horton, the United States Supreme Court refused to hear Doe and the Seventh Circuit decision stands.

The Wisconsin decision In the Interest of L.L. suggests that there should be some reasonable suspicion before searches are undertaken. The picture in the federal courts is cloudy, however, until the Supreme Court chooses to hear the issue. As the cases discussed in this chapter indicate, however, sniff dog searches contain the promise of almost certain litigation.

Strip Searches. A New York district court case, Bellnier v. Lund, has already been cited because it developed much quoted standards for conducting searches of students.[32] In Bellnier, litigation arose when an entire fifth-grade class was strip searched in an effort to discover which student stole $3. This search was found invalid because there was no reasonable suspicion that any one student had stolen the money, which was never found. Damages were not allowed, however, because it had not been shown that school personnel had not acted in good faith and because the law on student searches was "unsettled." A similar holding in subsequent cases regarding damages cannot, therefore, be guaranteed. School boards can be held liable for damages in cases in which a student's constitutional rights are abridged.[33]

A New York case explicitly rejected the "good faith" defense against damages in a strip search of a student who was found alone in a classroom during a fire drill.[34] Teachers thought the student's presence in the room so unusual that they searched her book bag looking for stolen items. None was found, so the student was searched. Again nothing was found. Claims made later that they were looking for drug paraphernalia were rejected by the district court, and further hearings were ordered in the case on the question of damages. While state statutes generally protect teachers and administrators from personal liability in such cases, extreme disregard of constitutional rights might result in a denial of immunity.[35]

IV. Summary.

Reasonable suspicion standards are present for most searches conducted within the school environment. These standards give way to the more rigorous probable cause standard if a search of a student's person is involved. School personnel should also consider the use to which the products of a search will be put. In cases where the search results in criminal prosecution, as distinct from school disciplinary proceedings, more rigorous search standards may be applied. School expulsion is a penalty of such severity that higher standards may also be used.

Any school system wishing to avoid litigation should prohibit the use of sniff dogs and strip searches. Aside from the negative image conveyed to the public about the system using such techniques, it is almost inevitable that innocent students are involved when mass searches are conducted. Courts have not been reluctant to hold such procedures invalid, and systems have found it necessary to pay settlements in order to avoid the risk of successful damage claims.

While there are occasions when is it necessary for a school to proceed with a search before police can be summoned, particularly when weapons or drugs are involved, calling the police in such cases remains the best policy. Schools would be well advised to establish a relationship with police departments before such calls are made. In other words, superintendents or principals should develop ties with juvenile officers or other appropriate officials to determine in advance when police will be called and how such visits will be conducted. In summary, searches are not conducted frequently and advance planning can help avoid sudden action by teachers or administrators which later will be regretted.

NOTES

[1] Burdeau v. McDowell, 256 U.S. 465 (1921).

[2] West Virginia State Board of Education v. Barnette, 319 U.S. 624 (1943) describes the powers of school boards.

[3] In re Gault, 387 U.S. 1 (1967).

[4] Mapp v. Ohio, 367 U.S. 643 (1961).

[5] Camera v. Municipal Court, 387 U.S. 523 (1967). For a discussion of this and other 1960's search cases, see Section 3, "Procedural Safeguards," in Criminal Law (Cambridge: Harvard Law Review Association, 1972).

[6] Terry v. Ohio, 392 U.S. 1 (1968).

[7] In the Interest of L.L. v. Circuit Ct. of Washington Cty., 280 N.W.2d 343 (Wis. Ct. App. 1979).

[8] Id. at 352.

[9] See Tarter v. Raybuck, 556 F. Supp. 625 (N.D. Ohio 1983).

[10] *Bellnier v. Lund*, 438 F. Supp. 47 (N.D.N.Y., 1977).

[11] *Katz v. United States*, 389 U.S. 347 (1969).

[12] *Zamora v. Pomeroy*, 639 F.2d 662 (10th Cir. 1981).

[13] *In re W.*, 105 Cal. Rptr. 775 (Cal. App. 1973).

[14] *People v. Overton*, 20 N.Y. 2d 360 (N.Y. 1967).

[15] *Cardwell v. Lewis*, 417 U.S. 583 (1974).

[16] *Carroll v. United States*, 267 U.S. 132 (1925).

[17] *State v. D.T.W.*, 425 So.2d 1383 (Fla. App. 1983).

[18] *Jones v. Latexo Indep. School Dist.*, 499 F. Supp. 223 (E.D. Tex. 1980).

[19] *Horton v. Goose Creek Indep. School Dist.*, 690 F.2d 470 (5th Cir. 1982), *cert. denied*, 103 S. Ct. 3536 (1983).

[20] 452 U.S. 962 (1981).

[21] See fn. 7 *supra*.

[22] *State v. F.W.E.*, 360 So.2d 148 (Fla. App. 1978).

[23] *State v. McKinnian*, 558 P.2d 781 (Wash. 1977).

[24] *In re Ronald B.*, 401 N.Y.S.2d 544 (N.Y. App. Div. 1978).

[25] *Bahr v. Jenkins*, 539 F. Supp. 483 (E.D. Ky. 1982).

[26] *In re Dominic W.*, 426 A.2d 432 (Md. Ct. Spec. App. 1982).

[27] *State v. Mora*, 307 So.2d 317 (La. 1975).

[28] See *Horton v. Goose Creek*, fn. 19 *supra*.

[29] *Id.* at 478.

[30] *Horton v. Goose Creek Indep. School Dist.*, 693 F.2d 525 (5th Cir. 1982).

[31] *Doe v. Renfrow*, 475 F. Supp. 1012 (N.D. Ind. 1979), 631 F.2d 91 (7th Cir. 1980), *cert. denied*, 451 U.S. 1022 (1981).

[32] See fn. 9 *supra*.

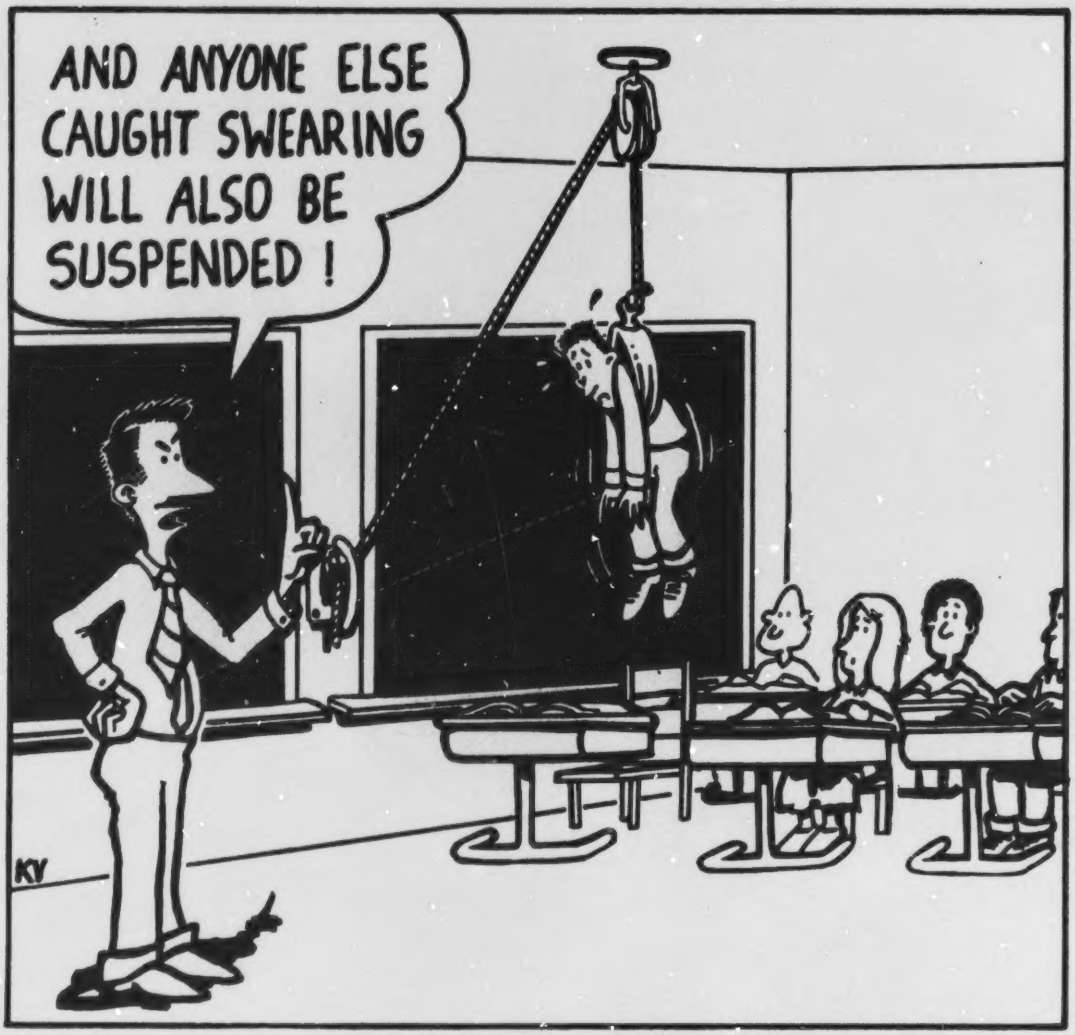
[33] *Wood v. Srickland*, 420 U.S. 308 (1975), *Mannell v. Department of Social Services, City of New York, and Bd. of Educ.*, 436 U.S. 658 (1978).

[34] *M.M. v. Anker*, 477 F. Supp. 837 (E.D.N.Y. 1979), *aff'd*, 607 F.2d 589 (2d Cir. 1979).

[35] For a discussion of this and other issues related to search and seizure, see J. William Brammer, Jr., "Search and Seizure in the Public Schools," *School Law in a New Decade* (Topeka: National Organization on Legal Problems of Education, 1981); and Gail Paulus Sorenson, "Search and Seizure in Public Schools: Recent Developments," *Educators and the Law*, Stephen B. Thomas, Nelda H. Cambron-McCabe, and Martha M. McCarthy, eds. (Elmont, N.Y.: Institute for School Law and Finance, 1983).

CHAPTER 5

STUDENT DISCIPLINE


AND ANYONE ELSE CAUGHT SWEARING WILL ALSO BE SUSPENDED !
KV

1. To what extent do students have constitutional rights which cannot be denied by school rules?

2. What do the Wisconsin Statutes say about school expulsion and suspension?

3. What kind of hearing is required before a student is expelled from school? Suspended?

4. Are hearings required before a student is removed from participation in extracurricular activities?

5. Can students receive damages from school personnel when they are denied a hearing?

6. What legal guidelines apply to corporal punishment in Wisconsin?

7. Can schools enforce rules regulating student conduct out of school?

8. To what extent are detention and in-school suspensions subject to legal challenge?

I. School Rules and Due Process.

School boards and individual school administrators have broad powers to establish and enforce school disciplinary rules. The power to set reasonable school rules flows both from state statutory provisions which allow school boards to establish and enforce school rules and from many individual court decisions which have ratified the actions of teachers and administrators who are carrying out their official duties. In Wisconsin, Section § 120.13(1) of the Statutes authorizes school boards to promulgate school rules and allows them to delegate this duty to administrators or teachers, if they wish.

While courts in the United States have disapproved of some disciplinary actions, notably when constitutionally protected rights were at stake, courts also have consistently sided with school personnel seeking to maintain order and an educational atmosphere in schools. This philosophy of judicial restraint regarding intrusions into school administration is expressed in United States Supreme Court education decisions. A good example is found in Epperson v. Arkansas:

> Judicial interposition in the operation of the public school systems of the Nation raises problems requiring care and restraint. . . . by and large,

> public education in our Nation is committed to the control of state and local authorities. Courts do not and cannot intervene in the resolution of conflicts which arise in the daily operation of school systems and which do not directly and sharply implicate basic constitutional values.[1]

Students have basic constitutional rights which cannot be taken away by school rules. For example, they cannot be disciplined for exercising their first amendment right to practice an organized religion or to express limited free speech in school, as discussed elsewhere in this book. Nor can they be removed from school, through either suspension or expulsion, without some form of hearing, since students have a state constitutional right to an education.

This chapter focuses on how school systems and public school personnel can discipline children. It concentrates on how rules can be enforced and on the procedures which must be followed when students are separated from school. Finally, it suggests that it is in the interest of everyone in the school to have reasonable student conduct rules which are fairly and uniformly enforced.

Due Process in School Discipline. The Fourteenth Amendment of the United States Constitution protects individuals from arbitrary or capricious actions by government. Fundamental fairness is insured by two types of due process, substantive and procedural. Substantive due process requires that the rules themselves be fair and have a rational relationship to some desirable public purpose. Rules against long hair worn by students have been struck down by some courts as violating substantive due process. Procedural due process requires fairness in the way a government decision was made. Thus an individual has a procedural due process right to present his or her position in a matter in which he or she has a significant interest. Generally speaking, the more that is at stake, the more formal the procedures must be. Thus school expulsions require more formal procedures than suspensions.

In the last ten years courts have also held that liberty and property rights are present in some school discipline cases. Students have a property interest in obtaining an education. Educators argue that completion of school is a desired and valuable life credential. Completing school may, for example, increase the earning potential of the degree recipient. Thus courts have recognized that completing high school has an economic value or, in other words, is a property right. Students also have a liberty interest in keeping their reputations, especially their written school records, free from unfair or unwarranted accusations.

Courts have applied due process requirements to suspensions and expulsions from school in order to protect the property and liberty rights of students. Due process requirements vary, however, with the severity of the punishment. In the case of expulsion from school, when the stakes are the greatest, a more complete due process is required. In the case of suspension, where the property and liberty interests are less, so too are the required procedures. For most minor school disciplinary actions no due process, either formal or less complete, is required. These distinctions will be clarified in the sections which follow.

II. Expulsion.

Expulsion is the most serious disciplinary action which can be taken against a student. Since the Wisconsin Statutes limit suspensions to a maximum of seven days, any removal of a student for more than seven days is an expulsion. Both the student's liberty and the property interests are implicated in such cases. Section § 120.13(1) of the Wisconsin Statutes allows school boards to expel students in certain situations. Only school boards can make the decision to expel a student.

A school board may expel a student, under Section § 120.13 (1), only for one of the following reasons:

1. if the board finds the student guilty of repeated refusal or neglect to obey school rules;
2. if the student engaged in conduct while at school, under the supervision of school authorities, or out of school which endangered the health, safety, or property of those in school; or
3. the student made or caused a false bomb threat to be phoned to the school.

The "repeated refusal to obey school rules" clause prohibits expulsion for a single act, unless the health, safety, or property of others was also endangered. The school board must also determine that the school's interest requires expulsion. Charges against students who are to face expulsion proceedings should refer to one or more of the statutory grounds for expulsion. School boards do not have the power to add additional grounds for expulsion.

Before a student is expelled, the statute requires that the student and the student's parents receive a notice of the expulsion hearing at least five days in advance. The notice must detail the specific charges against the student and must include a copy of the state law related to expulsions. The charges must be fully detailed; general statements, such as "the student frequently violated rules," are inadequate.

A student may be represented by an attorney at the expulsion hearing. Although the statute requires that written minutes of the meeting be kept and made available to the student or counsel on request, the use of a tape recorder or legal stenographer is advisable. Should the student be expelled, written notice of the fact must be mailed to both student and parents. An expulsion order can be appealed, under the terms of the statute, to the State Superintendent of Public Instruction, who may affirm or overturn the expulsion. The State Superintendent may rehear all or part of the case. This latter power was upheld in a 1978 Wisconsin circuit court case.[2]

Courts have consistently granted to students facing expulsion the right to call witnesses.[3] In an Arkansas case a student was expelled from school for kissing a fellow student and for exclaiming, "What a drag," when told by a teacher to stop.[4] The school board in the case refused to let the student question the teacher about the incident at the expulsion hearing, and the federal court subsequently overturned the expulsion.

A California appeals court made a similar finding in a separate case, rejecting a school system's argument that witnesses might subsequently be threatened if students filing charges against the accused were forced to testify.[5] After a lengthy discussion of other cases related to the issue, the California court concluded:

> Denial of the opportunity to confront and cross-examine adverse witnesses in an expulsion proceeding exposes the student to risk of erroneous deprivation of his educational interest where, as here, the decision turns on factual issues the correct resolution of which depends on credibility of witnesses.[6]

While the due process afforded to students facing expulsion in some respects mirrors the protection afforded defendants in criminal proceedings, courts do not always reverse school boards when they make minor procedural errors while conducting the expulsion hearing. Of course, what is "minor" is sometimes itself the subject of litigation. This was seen in a case involving the expulsion of a Racine, Wisconsin, student who appealed the school board's expulsion decision to the State Superintendent of Public Instruction. The board had accepted "hearsay" evidence in conducting its hearing. In other words, some facts pertinent to the case were offered by individuals testifying about what others had said about the incident. The

State Superintendent reversed the board's decision to expel the student, and the board appealed to the state courts. In 1982 the Wisconsin Court of Appeals ruled that the expulsion was valid and that a school board could not be expected to know all the "niceties" of hearsay evidence and legal procedure.[7] To avoid litigation of this sort, however, it is clear that school boards should have competent legal counsel on hand during the expulsion process, even if a board's decision might be upheld in the face of subsequent legal challenges.

Procedural issues were also raised by a Mississippi high school student who carried a switchblade knife to school, was expelled for the remainder of the school year, and sought an injunction to prevent the penalty. The injunction request was denied by a district court, and the student's parents appealed to the Fifth Circuit Court of Appeals.[8] The student had admitted taking the knife to school and had received a hearing before the school board. On appeal, the plaintiffs contended that the school board's hearing was flawed because there was inadequate notice and no opportunity to confront witnesses. Instead, taped testimony from some witnesses was played for the school board. In considering this flaw, however, the court focused on the fact that the plaintiff had never denied the knife charge. Both the plaintiff and his mother had participated in the expulsion hearing, and the court held that the flawed procedures were not fundamentally unfair or legally prejudicial. The student responded to this adverse decision by filing a request for a rehearing by the Fifth Circuit *en banc*.[9] While recommending that the school board change its practice regarding the use of taped testimony, the appeals court refused to grant the request, noting that the evidence against the student was "so overwhelming" that a school board rehearing would not change the result.

A Pennsylvania student who was suspended and then expelled for assaulting another student while under the influence of alcohol brought suit challenging the validity of the expulsion.[10] The student based his case on the grounds that he had been suspended for 13 days before the expulsion hearing was held, in violation of the Pennsylvania Code requiring a maximum of 10 days before a hearing. The appeals court concluded that the period of time was excessive, but that the error was not of sufficient magnitude to require reversing an otherwise proper expulsion.

Administrator Role in the Hearing. School superintendents and other administrators must exercise caution in seeking to influence school boards hearing expulsion cases. Courts in other parts of the country have ruled that the role of administrators in assisting school boards in reaching a decision must be limited to presenting the charges and arguing for the expulsion. In a California case, the expulsion of several students was overturned when the superintendent sat with the board during its deliberations.[11] The federal court saw this as an undue intrusion in the process, just as having the prosecutor in the jury room might influence the outcome of a jury deliberation. In a similar case, a court found no conflict in having a school board attorney prosecute a case against a student and subsequently advise the board on how to handle it.[12]

As already discussed, students in Wisconsin can be expelled only for repeated violations of school rules, for activities which endanger the health, safety, or property of others, or for false bomb threats. Unless the violation could be matched with one of these requirements, the expulsion of a student cannot occur. School boards cannot create their own grounds for expulsion. For example, courts elsewhere have accepted the expulsion of students for violating no-smoking rules.[13] More than a single violation of such a rule would be needed before expulsion for these grounds could occur in Wisconsin.

Automatic expulsion for possession of marijuana in school has been adopted by several Wisconsin school boards. Such a rule was praised and upheld in a recent federal court case[14] but was found to be contrary to Wisconsin Statutes in a Wisconsin circuit court decision.[15] Also, the State Superintendent has ordered students expelled for a single possession charge to be reinstated in school.[16]

III. Suspension from School.

The United States Supreme Court, in Goss v. Lopez,[17] held that students must be afforded some due process before their suspension from school, even for short periods of time. The Court reasoned that even a short suspension took away the student's property right to attend school and the liberty right to maintain one's good name. Therefore the Court sought to reduce the likelihood of erroneous suspensions by making sure that the right party was suspended. Only very limited hearing rights were granted in such cases, however. Goss requires that the principal or suspending officer provide the student with written or oral notice of the charges, the basis or evidence for the charges, and an opportunity to deny them. Such a hearing, while minimal, at least addresses the question of mistaken suspensions which the majority in the 5-4 decision felt might otherwise occur. While the majority argued this process was "less than what a fair-minded principal would impose,"[18] the four-justice minority opinion argued the hearing process was an unwarranted intrusion in the operation of the country's schools. Intrusive or not, such hearings are now required except in situations where the student poses a threat to persons, property, or the academic process. In such cases the student can be suspended immediately and the hearing can be held as soon as is practicable.[19] It should be noted that students do not have the right to have an attorney, call witnesses, or cross-examine in suspension cases.

Courts in many jurisdictions have refused to expand the *Goss* hearing requirements. A Maine student who admitted using marijuana on school grounds was suspended and subsequently expelled. The student and his parents challenged the decisions, raising a variety of procedural arguments.[20] First, citing *Miranda v. Arizona*,[21] the student argued that his initial questioning about the matter should have been preceded by a warning that he had the right to remain silent and that he had the right to have his parents present before questioning. Next, the student claimed a right to leave the principal's office during questioning. The student also argued that his participation in a drug abuse program required the school board to reduce the expulsion penalty and that the student's "school probation" following his return from the expulsion deprived him of a property interest. The district court rejected all of these novel claims, refusing to expand the *Goss* suspension hearing requirements or to find an error in the district's expulsion procedure. The court decided that there was no precedent or constitutional justification for any of the arguments.

Wisconsin Statute § 120.13(1) also addresses the question of student suspension from school. Suspension may occur for the violation of a single school rule or may be based on the same grounds as those for expulsions. The statute requires that parents be given prompt notice of the suspension and reasons for it and the chance to have a conference with the district administrator or designee about the matter. The designee may not be employed in the school from which the student was suspended. Suspensions in Wisconsin can last only up to three days, or seven days if expulsion proceedings are being initiated. Repeated three-day suspensions for the same charge for which the student was initially suspended are not possible under the statute.

While some school districts require a parental conference before a suspended student is readmitted, their failure to attend such a conference cannot be used as a reason to extend the suspension beyond the three-day period. Students can be readmitted to school at the discretion of administrators short of the end of the three-day period. Should it subsequently be determined that a student was suspended erroneously, all references to the suspension must be expunged from the student's record. Administrators may also expunge suspensions from the record for subsequent good behavior, if that is the district policy. Such a policy is an incentive for improved conduct. There is no appeal of a suspension to the State Superintendent. Court action is the only alternative if parents wish to pursue the issue. Courts sometimes overlook minor deviations in a district's suspension policies.[22]

Questions frequently arise concerning the reduction of student grades for work missed during suspensions. Section § 120.13(1)(b) of the Wisconsin Statutes requires that suspended students be permitted to take any quarterly, semester, or grading period examination missed during the suspension period. Students may, however, miss class presentation opportunities on which course grades might partially be determined.

Some school districts use suspension as a penalty for truancy. This runs counter to state statute. As discussed in the chapter of this book on attendance, there are specific statutes in Wisconsin which deal with truancy and these should be followed. Many Wisconsin school districts, however, do use suspension for this offense, arguing that subsequent truancy is discouraged by use of the penalty, or that parents become involved as a result. Without commenting on the merits of these arguments, it can be said that few cases have been litigated involving the appropriateness of suspension for truancy. In one such case from another state, the school district was upheld in its suspension decision, even though the parents argued that their child had been given their permission to miss school.[23]

Suspension from School Activities. As discussed in the extracurricular activities chapter, courts generally do not hold that students about to be removed from sports teams or clubs have the right to a hearing. However, because it takes little time to conduct a short hearing, to ensure that a rule has been broken or that the correct party has been apprehended, it is sensible to conduct the hearing before taking official action. This is the policy recommended by most coaches' associations.

In a case which came close on the heels of the *Goss* decision, a federal court declined to extend hearing protection to a student about to be excluded from interscholastic athletics.[24] The Pennsylvania court reasoned that *Goss* applied to "total exclusion from the educational process" while the individual activities which make up that process do not, in themselves, constitute protected interests. This decision might have turned out differently, however, if the student had shown that his removal from athletics had caused him some measurable harm, or if the student was handicapped within the meaning of the Rehabilitation Act of 1973. This latter category is discussed in the chapter on handicapped students.

A 1974 Wisconsin Attorney General's opinion suggests that students can be suspended from the privilege of riding a school bus without first being suspended from school.[25] Students must receive a suspension hearing, however, and all other statutory requirements regarding suspension must be met, including the three-day limit. Likewise, statutory expulsion proceedings should be used if expulsion from school bus priviledges is considered. The statutory grounds for expulsion must be present.

Suspension of Minority Group Students. Suspension of a student usually involves two steps. A teacher or other staff person first refers a disciplinary incident to an administrator for action and, second, that administrator must decide to suspend the student. Both the referral and the penalty are discretionary actions, in most cases. Given this fact, there is a danger that suspension will be disproportionately meted out to members of particular classes or racial groups. Certain students, for example, may be "expected" to misbehave. Nationally, suspension of minority students exceeds their proportionate numbers in the school age population.[26] School administrators, then, have a special need to avoid discrimination in school discipline.

A 1980 New York federal court decision held that the substantive due process rights of minority children were violated by the suspension of a disproportionate number of minority students while white children were not suspended for the same offenses.[27] In two additional cases, racial discrimination could not be proved.[28] The disproportionate disciplining of minority children, then, leaves districts open to litigation under a variety of fourteenth amendment claims and other civil rights statutes and provisions.

Damages for Faulty Hearings. The question of damages which might be assessed when a student was denied the minimal hearing required before suspension was answered by the United States Supreme Court in *Carey v. Piphus*.[29] The 1975 *Goss* decision established the constitutional requirement of the hearing but did not answer the question of what damages might result if it were not provided. The students who brought the *Carey* case did not deny the offenses for which they were suspended. School officials also admitted they did not meet the requirements of due process before the suspension, not having provided the students with any presuspension hearing. The Court of Appeals awarded damages to the students, following the holding in *Wood v. Strickland*[30] that school administrators are liable for damages when they deny a student his or her constitutional rights. The administrator cannot claim ignorance of the right in question in order to avoid liability.

The Supreme Court reversed the award of damages in *Carey*, since the students in the case had not shown that they suffered any real damage as the result of not having the hearing. Because they had not received the hearing, however, they were given nominal damages of one dollar. While *Carey* did not result in significant damages awarded to the students, it does hold a number of cautions for school administrators. First, it is clear that, if students have been erroneously suspended and can show actual harm as a result, then the damage awards might be significant. Second, the opinion held open the possibility that mental distress resulting from an erroneous suspension might be compensated. Finally, the Court held that the right to a hearing is absolute, save for the exceptions contained in the original *Goss* decision, such as the existence of major disorders in the school which would preclude an immediate hearing.

In a Michigan case, a suspension of students for breaking into the school and burning attendance records started as a suspension but took on the character of an expulsion.[31] *Goss* procedures were followed in the initial suspension, but the series of administrative steps thereafter undertaken was extremely convoluted. The students' parents claimed that the students had been expelled while the school maintained it was seeking the placement of the students in another school. After wading through these conflicting claims, the district court finally concluded that the extended suspension had taken on the character of an expulsion and the failure to hold a formal hearing on the charge violated the students' due process rights. Following the Supreme Court's decision in *Carey* the court concluded that the students' rights had been violated but they also clearly were guilty of the offense at issue and therefore were entitled to one dollar in compensatory damages.

A Kentucky appeals court sustained the policy of a school district which automatically suspended students found consuming alcohol at school, but let stand a lower court decision that automatic expulsion for alcohol consumption was arbitrary.[32] The students in question had been found drinking on a school-sponsored band trip. The appeals court concluded that the lower court had been correct in its interpretation of the state suspension and expulsion statute which holds that suspension was mandatory for a first offense of this sort. Because mandatory expulsion is not mentioned in the statute, the appeals court concluded that the lower court did not exceed its authority in holding that the expulsions were unreasonable. No damages were allowed in the case.

In a 1982 case, a high school senior was involved in a football game drinking incident and had been offered the choice of an in-school or out-of-school suspension.[33] She chose the in-school penalty but missed several class examinations. A lower court ruled that this denied the student her rights to substantive due process. Both parties appealed, the school district seeking reversal of the decision, and the parents seeking dismissal of the district's appeal on the grounds of mootness, as well as claiming attorney fees. The appeals court sustained the mootness claim, noting that the student had been graded in all the courses in question and had entered college. As to the attorney fees, the court concluded that fees could be awarded under 42 U.S.C. § 1988 only if the issues in the case presented a violation of specific constitutional guarantees. The court denied the fees, noting the issues raised did not represent a sufficiently grave constitutional violation. Citing *Wood*, the court held that § 1988 was not intended to justify fees in cases involving simple administrative errors. In another case, a Georgia student also sought damages for a wrongful suspension.[34] A state appeals court held that the suspension might have been "hurried and erroneous" but was not willful or malicious, and it refused to award damages.

Discipline Point Systems. Some school districts have systems by which points are awarded for minor offenses, leading to suspension when a certain total is reached. These systems are ineffective when there is disagreement among teachers as to the importance of all of the rules, or when students are given the opportunity to commit the same rule infraction several times before punishment ensues. This gives the student several punishment-free opportunities to break the same rule. There do not appear to be any legal barriers to such systems, however. As already noted, Wisconsin Statutes authorize suspension for violation of school rules and it is possible to suspend students for cumulative violations. In a Virginia case, the suspension of a student for cumulative offenses, including chewing gum and not paying attention in class, was upheld by a federal court.[35]

IV. Corporal Punishment.

Wisconsin Statute § 939.45(5) covers the *in loco parentis* powers of state officials to discipline minors. The application of corporal punishment is a priviledge arising from *in loco parentis*. Liability, either civil or criminal, may arise when punishment is: inflicted with malice; causes serious bodily harm; or, the child was not subject to punishment because he or she was not guilty. These requirements suggest that corporal punishment presents significant liability dangers. School systems would be advised to find alternatives.

Local school boards, under their broad rule-making authority, remain free to establish their own policy on corporal punishment. Boards are free either to prohibit corporal punishment or to authorize its use. In the absence of any local school board policy, however, local school personnel are best advised not to set their own policies. The presence of an adopted policy has been noted in the two cases reaching the U.S. Supreme Court where corporal punishment was upheld.

Corporal punishment, where permitted, has generated numerous lawsuits. Most corporal punishment systems follow the guidelines established at a lower court level in a case which subsequently was appealed to the United States Supreme Court.[36] In Baker v. Owen the Supreme Court, in a 5-4 decision, upheld a corporal punishment system which included the following: corporal punishment was to be used only when less restrictive disciplinary measures would not be effective, when a second school official was present with the child and both had been notified of the reasons for the punishment and, if requested, parents had to be notified in writing of the charges against the student and given the name of the second official.

In 1977, the Supreme Court ruled in Ingraham v. Wright[37] that no hearing needed to be given before corporal punishment and that the punishment per se did not violate the cruel and unusual punishment clause of the eighth amendment. The court did note, however, that both criminal charges and private lawsuit might result in cases where injury to the student occurred as the result of the punishment.[38]

The Baker procedures preclude swift corporal punishment and are fairly complicated, requiring careful record keeping. It is also clear that excessive punishment, or injuries resulting from trying to paddle a squirming student, may result in civil or criminal litigation. Corporal punishment also is less attractive for students as they mature and grow in size and is frequently questioned on the grounds of its educational effectiveness. Wisconsin Statute § 939.45, which protects school personnel from lawsuit when they are engaged in professional activities, clearly excludes them from protection when excessive force is used. This may be alleged in corporal punishment cases. The wisdom of employing the punishment, then, should surely be questioned.

Striking or physically abusing students is not corporal punishment. This distinction can be seen by reviewing the facts of a Connecticut Supreme Court case.[39] A student was enrolled in a music class and misbehaved by changing the words in a song being sung. In response to this behavior, the teacher threw the student into a chalk board and then dragged the unresisting student to a hallway where he was swung against a wall, fracturing the student's clavicle. The teacher claimed immunity from suit both as a "public officer" and as a state employee, but the court concluded he was neither under the state general statutes. While holding that teachers could use "reasonable means" to control a student, the court found that the punishment in this instance was "clearly excessive." A lower court's award to the student was upheld.

As already noted, corporal punishment involves the highly structured administration of a penalty for breaking school rules and generally takes place only in systems where the school board has authorized its use. The need to restrain a student, however, can occur at any time, in any system. Examples include a student throwing objects in a classroom, fighting, or otherwise endangering the health, safety, and well-being of other students, or of the student involved. Teachers routinely intervene in such cases, weighing their own safety and hopefully referring to school procedures already developed by the professional staff to decide how to handle these situations. Teachers making their best professional judgment on the use of restraint are almost always sustained in any subsequent litigation. In fact, school personnel often find themselves in a quandary because their failure to intervene in certain situations might lead to a lawsuit.

School administrators, teachers, and legal counsel should join the local school board in developing policies which pertain to the restraint of misbehaving students. The presence of such policies helps staff avoid lawsuits and protects students from others who might misbehave. Generally, it is wise to involve principals or other staff as soon as possible after such events begin.

V. Other Discipline Issues.

Discipline Off Campus. School districts have broad powers to establish rules which regulate the conduct of students in school or at school-sponsored activities. That power, however, becomes more open to question when activities beyond the geographical boundaries of the school are considered. Attempts to extend the scope of the school's disciplinary authority could lead to litigation. In one such case, a Pennsylvania student was given a three-day in-school suspension for calling his teacher "a prick" at a community shopping center.[40] The federal court ruled that the punishment was too insignificant to warrant judicial intervention. In another case more directly related to a school function, the Supreme Court of Wyoming ruled that a student could be suspended for operating his motor vehicle in such a way as to impede the progress of a school bus.[41] The Supreme Court of Connecticut concluded, however, that school authorities went too far in expelling a student for participating in a school yard gang fight when school had been adjourned for the year.[42]

In-School Suspension, Detention, and Fines. Disciplinary penalties which do not exclude students from school or permanently remove them from some activity seldom lead to legal challenges. These matters remain largely within the discretion of school administrators, though it is possible that extreme or unreasonable actions might be challenged. While the wisdom of in-school suspensions from the perspective of their educational value has also been questioned,[43] most schools find the penalty significantly preferable to external suspension in most cases. Many students seek the suspension "vacation," expecially repeat offenders. Few students seek the isolation associated with the in-school penalty.

Detention systems are also used in many schools. While "serving time" in detention is sometimes boasted of by students, it generally serves as a useful penalty for minor rule breaking. If the detention is held after school, parents should be given a day's notice if the student will miss transportation home. Detention is now a permitted punishment for truancy under the Wisconsin Statutes.[44]

School districts cannot impose fines for school rule violations. An early Wisconsin Supreme Court case requires that all school rules be "needful for the government, good order and efficiency of the school."[45] Fines do not fit these criteria.

VI. Summary.

School rules must serve some legitimate educational function and, in areas such as attendance and exclusionary discipline, cannot be established contrary to existing state statute. Rules also cannot infringe on protected constitutional rights. Arbitrary rules will be struck down by courts, as was the attempt to impose a hair-length rule in a Wisconsin school.[46] Reasonable rules will be sustained. When what is "reasonable" is in doubt, counsel should be consulted and, if the rule is still questionable, schools might be well advised to operate without it.

School personnel face the issue of how many rules to promulgate. Some districts operate with so many rules that violations are inevitable, lessening the deterrent value of the remaining code. When school rulebooks have so many rules they cannot possibly be enforced, teachers and administrators enforce some rules but not others, and there is disagreement among staff members about which rules are important. Discipline becomes uneven and, from the perspective of students, unfair. Some students are punished for an offense while others are not. This leads to student resentment which is, in itself, a cause of further rule breaking.[47]

School boards and school personnel, then, should reach agreement on the rules which are important. A rule-making process which involves students, parents, and school officials could help develop such rules. To the extent that rules are agreed upon and uniformly enforced, school disorders will diminish.[48]

NOTES

[1] *Epperson v. Arkansas*, 393 U.S. 92 (1968), at 104.

[2] *Eagle-Palmyra School District v. Thompson*, Jefferson County Circuit Court, Case #6722 (1978).

[3] *Goss v. Lopez*, 419 U.S. 577 (1975).

[4] *Dillon v. Pulaski County Special School Dist.*, 468 F. Supp. 4 (E.D. Arkansas, 1978), *aff'd*, 594 F.2d 699 (8th Cir. 1979).

[5] *Aguirre v. San Bernadino City Unified School*, 170 Cal. Rptr. 206 (Cal. App. 1980). The California Supreme Court upheld the lower court. See *John A. v. San Bernadino City Unified School*, 187 Cal. Rptr. 472 (Cal. 1982).

[6] *Id*. at 212.

[7] *Racine Unified School Dist. v. Thompson*, 107 Wis.2d 657, 321 N.W.2d 334 (Wis. App. 1982).

[8] *McClain v. LaFayette Cty. Bd. of Educ.*, 673 F.2d 106 (5th Cir. 1982).

[9] *Id*., 687 F.2d 121 (5th Cir. 1982).

[10] *Porter v. Board of School Dirs*., 445 A.2d 1386 (Pa. Commw. Ct. 1982).

[11] *Gonzales v. McEuen*, 435 F. Supp. 460 (C.D. Ca. 1977).

[12] *Alex v. Allen*, 409 F. Supp. 379 (W.D. Pa. 1976).

[13] *Flint v. St. Augustine High School*, 232 So.2d 229 (La. App. 1975); *Randol v. Newberg Public School Bd*., 542 P.2d 938 (Or. App. 1975).

[14] *Petry v. Flaugher*, 505 F. Supp. 1087 (E.D. Kan. 1981).

[15] *M.P. et al. v. Racine Unified School Dist*., Racine County Circuit Court, Case #80-CV-592 (1980).

[16] See Raymond W. Dunne, "The State Superintendent's Expulsion Digest," Bulletin 1388, Wisconsin Department of Public Instruction, September 1980.

[17] 419 U.S. 577 (1975).

[18] *Id*. at 583.

[19] *Id.* at 582.

[20] *Boynton v. Casey*, 543 F. Supp. 995 (D. Me. 1982).

[21] 384 U.S. 436 (1966).

[22] See, for example, *Board of Educ. of Rogers, Arkansas v. McCluskey*, 662 F.2d 1263 (8th Cir. 1981), *rev'd*, 102 S.Ct. 3469 (1982).

[23] *Graham v. Bd. of Educ., Idabel School Dist. No. Five*, 418 F. Supp. 1214 (E.D. Okla. 1976).

[24] *Dallum v. Cumberland Valley School Dist.*, 391 F. Supp. 358 (M.D. Pa. 1975).

[25] 63 *Op. Wis. Att'y Gen.* 526 (1974).

[26] See Children's Defense Fund, *Children Out of School in America*, Washington, D.C., 1974.

[27] *Ross v. Saltmarsh*, 500 F. Supp. 935 (S.D.N.Y. 1980).

[28] *Sims v. Waln*, 536 F.2d 686 (6th Cir. 1976); *Diggles v. Corsicana Ind. School Dist.*, 529 F. Supp. 169 (N.D. Tex. 1981).

[29] 435 U.S. 247 (1978).

[30] 420 U.S. 308 (1975).

[31] *Darby v. Schoo*, 544 F. Supp. 428 (W.D. Mich. 1982).

[32] *Clark Cty. Bd. of Educ. v. Jones*, 625 S.W.2d 586 (Ky. App. 1981).

[33] *Myre v. Board of Educ. of Seneca Twp.*, 439 N.E.2d 74 (Ill. App. 1982).

[34] *Dillard v. Fussell*, 287 S.E.2d 96 (Ga. App. 1981).

[35] *Kirtley v. Armentrout*, 405 F. Supp. 575 (W.D. Vir. 1975).

[36] *Baker v. Owen*, 423 U.S. 907 (1975).

[37] 430 U.S. 651 (1977).

[38] See J. John Harris III and Richard E. Fields, "Corporal Punishment: The Legality of the Issue," 7 *School Law Journal* 1, 88 (1977); and Robert J. Simpson and Paul O. Dee, "Unusual

But Not Cruel: Policy Guidelines on Corporal Punishment," 7 *School Law Journal* 2, 183 (1977).

[39] *Sansone v. Bechtel*, 429 A.2d 820 (Conn. 1980).

[40] *Fenton v. Stear*, 423 F. Supp. 767 (W.D. Pa. 1976).

[41] *Clements v. Bd. of Trustees of Sheridan Cty.*, 585 P.2d 197 (Wyo. 1978).

[42] *Mitchell v. King*, 363 A.2d 68 (Ct. 1975).

[43] See David K. Wiles and Edward Rockoff, "In-School Suspension Practices and the Prison Hospital Experience," 7 *School Law Journal* 1, 65 (1977).

[44] Wis. Stat. Ann. § 118.16 (1981).

[45] *State ex rel. Bowe v. Bd. of Educ. of City of Fond du Lac*, 63 Wis. 234, 23 N.W.102 (Wis. 1885).

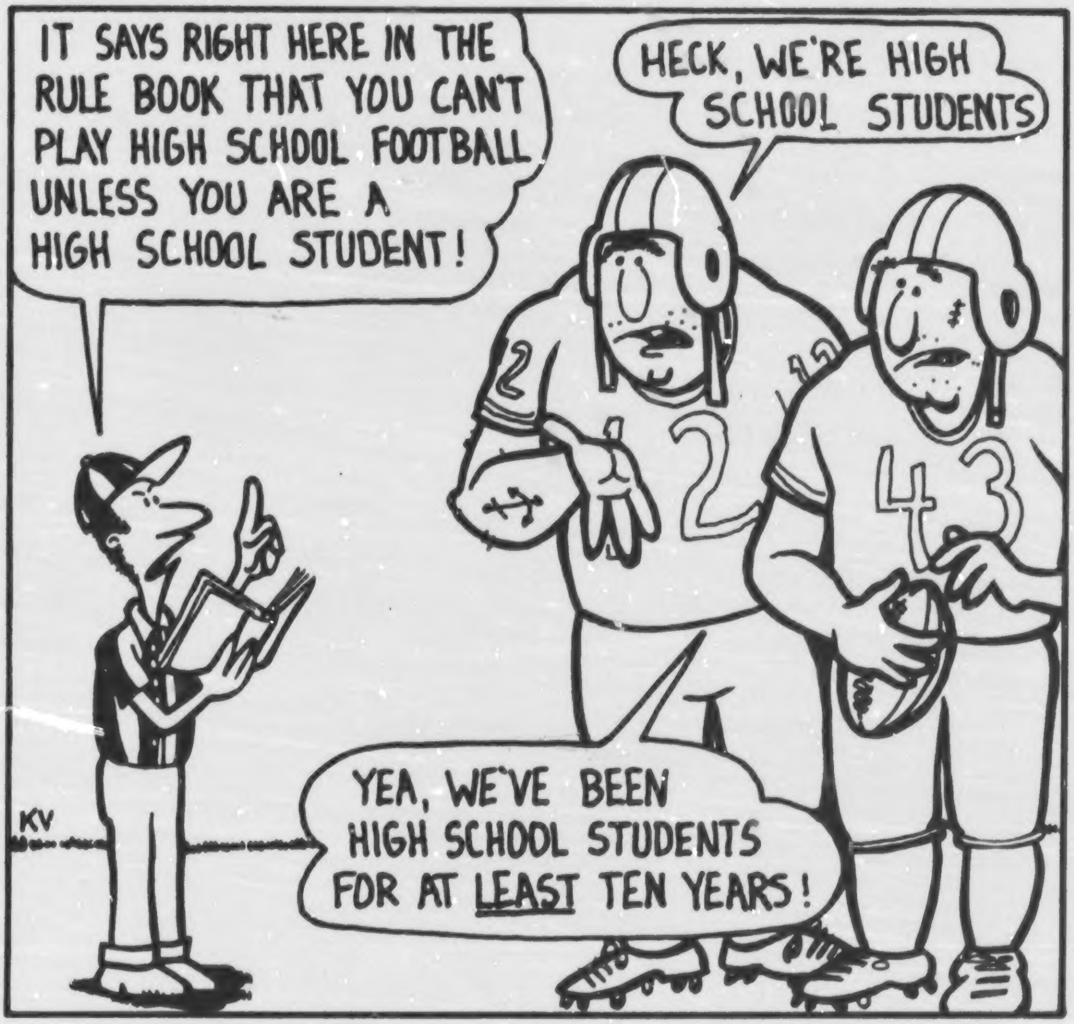
[46] *Breen v. Kahl*, 419 F.2d 1034 (7th Cir., 1969).

[47] See Ellen Jane Hollingsworth, Henry S. Lufler, Jr., and William H. Clune III, *School Discipline: Order and Autonomy* (New York: Praeger Publishers, December, 1983).

[48] *Id.*; there is an additional large literature on the relationships between school rules, their enforcement, and the decline of in-school problems. See John DeCeco and Arlene Richards, *Growing Pains--Uses of School Conflict* (New York: Aberdeen Press, 1974); Naomi Faust, *Discipline and the Classroom Teacher* (Port Washington, N.Y.: Kennikat Press, 1977); Vernon Haubrich and Michael Apple, eds., *Schooling and the Rights of Children* (Berkeley: McCutchan Publishing Corp., 1975) and William Aiken and Hugh LaFollette, eds., *Whose Child?* (Totawa, W.J.: Littlefield, Adams and Co., 1980).

CHAPTER 6

SCHOOL SPORTS AND CLUBS


IT SAYS RIGHT HERE IN THE RULE BOOK THAT YOU CAN'T PLAY HIGH SCHOOL FOOTBALL UNLESS YOU ARE A HIGH SCHOOL STUDENT!
HECK, WE'RE HIGH SCHOOL STUDENTS
YEA, WE'VE BEEN HIGH SCHOOL STUDENTS FOR AT LEAST TEN YEARS!
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KV

1. Do students have a constitutional right to participate in school sports?

2. What power do courts have to review the decisions of interscholastic athletic associations?

3. Can athletic associations enforce rules on eligibility to participate in school sports for students who have transferred schools?

4. Can married athletes be denied participation in school sports?

5. Are students entitled to a hearing before removal from sports teams or clubs?

6. Are female students entitled to participate on boys teams, or are separate but equal programs adequate?

7. What is the effect of Title IX on high school sports programs?

I. The Right To Play.

Athletics is an important part of the life in most high schools and for some athletes is the most significant activity in which they will engage during their school careers. Thus it is not surprising that the decisions of school administrators or state interscholastic athletic associations regarding individual athletes are sometimes the subject of litigation. This chapter looks at a variety of issues raised by these court cases. We will consider the right of students to participate in athletics, the rights of girls to have sports programs equal to those of boys, and the powers of athletic associations to regulate interscholastic competition.

Courts across the country have consistently held that students do not have a constitutional right to participate in sports. The Fifth Circuit Court of Appeals has ruled, for example, that such participation is "a mere expectation rather than a constitutionally protected claim of entitlement."[1] Likewise, a federal district court in Texas ruled: "Neither the right to play football nor the right to participate in state football playoffs is a fundamental right protected by the fourteenth amendment."[2] There is no reason to believe this ruling applied only to football and not to all other athletic competition. An Illinois district court similarly stated: "Of course, it is clear that participation in interscholastic athletics is not a right guaranteed by the constitutional laws of the United States."[3] Similar decisions have been rendered by other federal and state courts. Because athletic participation is not a fundamental right, courts scrutinize the actions affecting athletes less closely than they would if a constitutional right such as free speech were at issue.

Not only do students have no fundamental right to participate, but they do not have a "property interest" in such participation either. The Fourteenth Amendment to the United States Constitution states that no state shall "deprive any person of life, liberty, or property, without due process of the law." Some students have argued that they have been deprived of "property" by being excluded from athletic competition. "Property" in some of these cases means loss of a college scholarship and thus, sometimes, loss of a college education. In a Texas case, a federal court stated that students had "no property interest in the alleged injury to their hoped-for careers in college football or for football scholarships arising from inability to play in the football playoffs or to be viewed by college scouts."[4] The claim of such loss was seen as too speculative to be measured prospectively.

Other students have argued that the Goss v. Lopez[5] decision, which required that a student be afforded a brief hearing before suspension from school, should be extended so that a hearing is required before a student is suspended from a sports team. The Tenth Circuit Court of Appeals rejected the attempt to extend Goss:

> The educational process is a broad and comprehensive concept with a variable and indefinite meaning. It is not limited to classroom attendance, but includes innumerable components, such as participation in athletic activity and membership in school clubs and social clubs, which combine to provide an atmosphere of intellectual and moral advancement. We do not read Goss to establish a property interest subject to constitutional protection in each of these separate components.[6]

Other federal courts have agreed with this reading of Goss.[7]

Federal courts have ruled, however, that actions of athletic associations do constitute "state action."[8] In Wisconsin, a federal district court implicitly ruled that WIAA rules and regulations are "state action" by saying that WIAA rules must comply with the equal protection clause of the fourteenth amendment.[9] These decisions mean that athletic associations are not private groups but instead must be able to show that there is a "rational basis" for their rules. A rule requiring a high school athlete to miss competition for one year after transferring schools, for example, could withstand challenge because it has a rational basis--prevention of school transfers solely to play on another school's team. Courts have generally given broad latitude to associations in establishing such rules.

II. Athletic Association Rules.

Transfer Rules. The WIAA has a rule against participation on teams by students who transfer schools. While it has not been challenged on this ground, it appears to run counter to Wisconsin Statute § 121.77 which provides that non-resident, tuition students have "all the rights and priviledges" of a district's resident students. Generally, the transfer rules of state athletic associations have withstood frequent legal challenges, usually on constitutional rather than state grounds. In 1981, for example, the United States Supreme Court let stand a Fifth Circuit Court of Appeals case involving the Louisiana High School Athletic Association.[10] The transfer rule at issue stated that upon completion of elementary or junior high school, a student was eligible for interscholastic athletic competition only at the high school within his or her district. The student plaintiffs in the case were enrolled in a church school which did not have a high school in the same district as the student's junior high school. Even under this set of facts, the appeals court ruled that the students could not compete in interscholastic athletics and had not been denied equal protection.

A Missouri student also attempted to challenge that state association's transfer rules using an equal protection argument.[11] She suggested that she clearly had not been recruited and argued that no other school clubs had such stringent rules. The court, however, rejected this reasoning. Attempts to argue that transfers from parochial to public schools did not count,[12] or to establish "guardians" in the new district,[13] also have not been successful. In one case running counter to those just discussed, the Texas Supreme Court found that a student who had moved to Texas from Vermont when his father was transferred for business reasons had been denied equal protection, given the nature of the transfer, and should be allowed to play basketball.[14]

A handicapped student was able to show "compelling medical and psychiatric" reasons why he needed to play football, and therefore could compete, even though he transferred school districts.[15] The federal court concluded that the student was handicapped within the meaning of the Rehabilitation Act of 1973. (Also see the discussion in Chapter 9.)

Denial of the opportunity to play because a student is married has consistently been rejected. In three separate cases, federal district courts in Ohio, Texas, and Montana have struck down such school rules.[16] The rationale used by schools for imposing such a rule includes the goal of discouraging teenage marriages, helping the marriage by not allowing extracurricular activities to interfere with it, and the alleged need for married students to spend more time with their families. It also has been argued that when athletes marry it encourages other students to marry, due to the fact that athletes are often emulated. Each of the decisions, then, sided with the married students and rejected these arguments.

"Eight-Semester" Rules. Some athletic associations have implemented rules in which no student may be eligible for more than eight semesters of interscholastic athletic competition, starting when the student is a freshman, or when the student repeats grade eight voluntarily. This is often used to stop schools from retaining veteran squads or keeping promising athletes in junior high for one year so that he or she can attain greater physical prowess while in high school. This practice is called "red shirting" and is common in collegiate athletics.

Courts have consistently upheld rules against red shirting for high school competition. In a Fifth Circuit Court of Appeals case, for example, it was concluded, "The classification made by the eligibility regulation is neither inherently suspect nor an encroachment on a fundamental right."[17] The court viewed the rule as reasonably related to a legitimate state interest. A New York state court decided that such a rule was valid even though students had failed their senior year and were denied the chance to play football that year because of a teachers' strike.[18] The legitimate goals of stopping red shirting and the prevention of retaining senior squads were found to be of greater value than the students' interest in athletics.

Some states have rules which permit appeal to a committee of the state athletic association if the eight-semester rule works a hardship on students. In such instances, decisions made by the committee have withstood legal challenge, though the committee has an obligation to show that its decision was reasonable.[19] State athletic associations, it must be remembered, are public entities and cannot render decisions without explaining them.

Rules prohibiting participation in interscholastic competition when the student reaches the age of 19 also have been upheld.[20] Such rules serve to keep schools or parents from holding back students in their early school years so that they would be better able to compete in high school sports.

Tournament Decisions. Athletic associations sometimes make decisions regarding the eligibility of schools or players to participate in post season tournaments. As might be expected, these decisions are of great importance to players, fans, and coaches. Litigation challenging these association decisions has frequently occurred, but few court challenges have resulted in a reversal of the decisions. Several cases will illustrate this point.

A New Hampshire student claimed that he had been fouled in a qualifying track meet and had therefore been unable to run in the state "Meet of Champions." The state athletic association, however, ruled that he was ineligible to run because no referee had been close enough to the alleged foul to sustain the student's claim. The New Hampshire Supreme Court, on the day of the race, ruled that the association had followed proper procedures and that the decisions of meet officials could not be the subject of judicial review.[21]

In other cases, courts have sustained the suspension of students from competition for "conduct unbecoming an athlete" (fighting)[22] and have upheld the forfeiture of games in cases where ineligible players competed.[23] A Florida association rule limiting the number of team members participating in post season play was struck down, however.[24] During the regular season, teams had no limit on their size, while the tournament limit was 44 per team. The court held that this rule created two classes of players and violated the equal protection rights of students who were prevented from playing.

Athletic team dress or grooming codes, while common in almost every school district, have not always withstood legal challenge. A Seventh Circuit Court of Appeals case, discussed in greater detail in Chapter 5, held that students have a constitutional right to determine hair length, except when the length affects health and safety.[25] High school wrestlers, for example, could not safely wrestle with long hair. A Vermont case noted that longer hair was not always unsafe, since students could wear headbands in some sports.[26] In general, coaches should enact grooming rules which are reasonably related to some health or safety consideration, rather than to vaguely stated expressions concerning team identity or morale.

III. Sex Discrimination

Wisconsin law prohibits sex discrimination in athletics insofar as it is prohibited by the federal law against sex discrimination (Title IX of the Education Amendments of 1972).[27] Wisconsin Statutes, Section § 118.135 states:

> No person may be denied, on the basis of sex, the opportunity to participate in interscholastic, intramural or club sports offered in a public school, as provided in 20 *U.S.C.* § 1681 *et seq*. (Title IX). No person may be denied, on the basis of sex,

> necessary facilities, equipment, instruction or financial support for such sport, as provided in 20 U.S.C. § 1681 et seq.

Title IX states:

> No person in the United States shall, on the basis of sex, be excluded from participation in, be denied the benefits of, or be subjected to discrimination under any education program or activity receiving federal financial assistance. . . .[28]

Courts have reached varying conclusions with respect to the applicability of Title IX to education programs (such as elementary and secondary athletics programs) which do not directly receive federal monies. Some courts have held that an entire institution is a "program" for purposes of Title IX's prohibition against sex discrimination under "any program or activity receiving federal financial assistance," if that institution receives indirect or non earmarked aid.[29] Other courts have held that, unless a particular program within an institution (such as a school's athletics program) directly receives or benefits from federal monies, that program is not regulated by Title IX.[30] Some Courts and commentators have read the Supreme Court's decision in North Haven Board of Education v. Bell[31] to reinforce the latter "program-specific" interpretation of Title IX. Since the Supreme Court recently agreed to hear a case which raised this question directly,[32] the dispute may soon be resolved.

Many sex discrimination cases in the area of school athletics are decided on the basis of the equal protection clause of the fourteenth amendment. It contains a general prohibition against discrimination which is not dependent upon the receipt of federal aid. Based on the fourteenth amendment, a federal court in Colorado ruled that, even though there is no constitutional requirement for schools to provide any athletic program, whatever opportunity is made available must be done on equal terms for all students.[33] A federal court in Wisconsin reached the same conclusion, as discussed on the next section.[34]

Separate But Equal Athletics Programs. In Wisconsin, schools may provide "separate but equal" athletic programs. This is not necessarily so in other states. Most notably, the Sixth Circuit Court of Appeals modified the "separate but equal" solution to sex discrimination in one case,[35] while in another case, it invalidated an Ohio High School Athletic Association rule insofar as it prohibited girls from participating on a boys team in any contact sport.[36] In Morris v. Michigan State Board of Education, the Sixth Circuit Court of Appeals said that, even if the school provided a girls team, girls must be allowed to try out for the boys team. However, it explicitly limited its judgment to non contact sports. In Yellow Springs v. Ohio High School Athletic Association, the court held that the athletic association rule conflicted with Title IX which is "purposely permissive on this point."[37]

In contrast, the situation is very different for the Seventh Circuit and thus in Wisconsin. The controlling Wisconsin Interscholastic Athletic Association rule is found in the Association's Constitution, Article VI, Section G:

> The Board of Control shall prohibit all types of interscholastic activity involving boys and girls competing with or against each other except (a) as prescribed by state and federal law and (b) as determined by Board of Control interpretation of such law.

This rule was challenged in 1978 in Leffel v. Wisconsin Inter-scholastic Athletic Association, a case before a Wisconsin federal district court.[38] The court did not find the rule unconstitutional. However, on application, the court did decide that female students could not be denied the opportunity to participate in a particular sport which is afforded to male students. The court avoided full discussion of whether the provision of "separate but equal" programs are a sufficient solution in such cases, but did not disallow their use.

Where Leffel avoided the issue of "separate but equal," the Seventh Circuit Court of Appeals recently met the issue head on.[39] In 1981 the court ruled that schools which provide "separate but equal" athletic programs for girls and boys have met both constitutional and statutory requirements. The plaintiff in the case was an 11-year-old girl who wished to try out for the sixth grade boys basketball team rather than the girls team. Upon being denied this opportunity she sued the school system. It was shown through expert testimony in the case that Karen O'Connor was an extraordinary athlete who far outranked her fellow female athletes at that age level. However, the court agreed with the Leffel decision, by quoting the judge in that case:

> There are no allegations in the instant complaint that the defendants intentionally imposed different levels of competition on boys and girls. Any such differences arise from the abilities of the team members themselves.[40]

United States Supreme Court Justice John Stevens, sitting as Circuit Judge, reviewed the case as follows:

> In my opinion, the question whether the discrimination is justified cannot depend entirely on whether the girls program will offer Karen opportunities that are equal in all respects to the advantages she would gain from the higher level of competition in the boys program. The answer must depend on whether it is permissible for the defendants [the school system] to structure their athletic programs by using sex as one criterion for eligibility. If the classification is reasonable in substantially all of its applications, I do not believe that the general rule can be said to be unconstitutional simply because it appears arbitrary in an individual case.[41]

The Seventh Circuit Court of Appeals subsequently ruled that "separate but equal" programs are sufficient.[42] Determination of what is "equal" does not have to include the extreme cases of whether an extraordinary female is being treated equally with boys while participating in the girls program. Therefore, under this ruling, which is binding for Wisconsin, the *Yellow Springs* requirement of allowing girls to try out for boys teams where teams in that sport are present for girls does not have to be met. In fact, the Seventh Circuit Court in *O'Connor v. Board of Education of School District #23* directly stated that it would not follow *Yellow Springs*.

Separate Rules for Girls and Boys Teams in the Same Sport. In 1977, a federal district court in Oklahoma and the Sixth Circuit Court of Appeals both ruled that imposing different rules on girls and boys in basketball did not violate federal statutes or the federal Constitution. The Sixth Circuit Court of Appeals justified the decision and the rule on the "distinct difference in physical characteristics and capabilities between the sexes."[43]

In the Sixth Circuit case, the plaintiff claimed that the difference in basketball rules for girls and boys denied her equal protection because it disadvantaged her in competing for college scholarships. College women's teams play by standard rules. The court answered this claim by saying that the equal protection clause of the fourteenth amendment "requires equal treatment of persons subject to a state's laws: disparate treatment, or disadvantage, with respect to women from some other state, fails to present a claim under the equal protection clause."[44]

In sharp disagreement with these two cases is a ruling by a federal district court in Arkansas.[45] The court decided that different rules for girls and boys basketball did deprive girls of equal protection. The ruling was based on what the court saw as insufficient justification by the athletic association for the disparity in the rules. No physiological justification could be shown and therefore, the association was left with "tradition," which could not justify the disparity.

IV. Clubs and Nonathletic Organizations

Just as no constitutional right to participate in sports exists, courts have not recognized any legal right to membership in school clubs or nonathletic organizations. Claims that club memberships are protected rights or property interests have been consistently rejected. A district court in Wisconsin held that a student refused admittance into the National Honor Society had not suffered any injury to his constitutional rights.[46] The court ruled that since no fundamental interest was at stake school officials did not have to comply with the procedural due process guarantees of Goss v. Lopez.[47]

A further illustration of the judicial system's reaction to such attempts can be found in Bernstein v. Menard.[48] Bernstein was demoted in the school band for failing to accompany the band on a required trip. Bernstein sued in federal district court seeking to regain his former position as "first trumpeter," alleging a lack of due process in the disciplinary action. The suit was termed "vexatious and frivolous"[49] by the presiding judge and was summarily dismissed. Other attempts to extend Goss to school clubs and athletics have met with similar fates.[50]

The courts have also held that certain secret and/or undemocratic societies may be banned altogether from schools. The United States Supreme Court upheld a Mississippi Statute which prohibited Greek letter fraternities and societies from the state's educational institutions (including universities).[51] Efforts to prohibit such organizations in secondary schools have been undertaken in twenty-six states. These actions have been upheld by courts in several.[52] Only in Missouri has the state been denied the ability to ban such societies.[53] A statute covering such organizations does not exist in Wisconsin. Individual school systems could, however, impose restrictions on membership in those types of organizations.

V. Summary.

As a general rule, courts have been less likely to interfere with school policies related to activities than to those areas more centrally related to the educational mission of schools. While it is clear that schools must be sensitive to issues of sex discrimination in athletics and activities, no court has held that schools cannot develop reasonable rules regarding participation in activities, or that there is a constitutional right to participate in sports. Schools or athletic associations, then, can promulgate rules covering questions of eligibility, post season play, and removal from a sports team. Such rules, of course, must be evenly enforced and decisions regarding participation must be made with reference to written rules. Such rules should be based on considerations related to student health, safety, or some desired governmental purpose such as preventing recruiting. Rules related to improving team morale, or other vaguely stated rationales which coaches might devise, are less likely to withstand legal challenge.

NOTES

[1] Walsh v. Louisiana High School Athletic Ass'n, 616 F.2d 152, at 159 (5th Cir. 1980).

[2] Blue v. University Interscholastic League, 503 F. Supp. 1030, at 1035 (N.D. Texas 1980).

[3] Bucha v. Illinois High School Ass'n, 351 F. Supp. 69, at73 (N.D. Ill. 1972).

[4] Blue, at 1035.

[5] 419 U.S. 577 (1975).

[6] Albach v. Odle, 531 F.2d 983, at 985 (10th Cir. 1976).

[7] Kulovitz v. Illinois High School Ass'n, 462 F. Supp. 870, 875 (N.D. Ill. 1978).

[8] Dodson v. Arkansas Activities Ass'n, 468 F. Supp. 394 (E.D. Ark. 1979); Yellow Springs Exempted Village School Dist. Bd. of Educ. v. Ohio High School Athletic Ass'n, 443 F. Supp. 753 (S.D. Ohio 1978), 647 F.2d 651 (6th Cir. 1981); Gilpin v. Kansas State High School Activities Ass'n, Inc., 377 F. Supp. 1233 (D. Kan. 1973).

[9] Leffel v. Wisconsin Interscholastic Athletic Ass'n, 444 F. Supp. 1117 (E.D. Wis. 1978).

[10] Walsh v. Louisiana State High School Athletic Ass'n, 616 F.2d 152 (5th Cir. 1980), cert. denied, 449 U.S. 1124 (1981).

[11] Barhorst v. Missouri State High School Activities Ass'n, 504 F. Supp. 439 (W.D. Mo. 1980), aff'd, 692 F.2d 147 (8th Cir. 1982).

[12] Whipple v. Oregon School Activities Ass'n, 629 P.2d 384 (Or. Ct. App. 1981).

[13] *Herbert v. Ventetuolo*, 638 F.2d 5 (1st Cir. 1981).

[14] *Sullivan v. University Interscholastic League*, 616 S.W. 2d 170 (Tex. 1981).

[15] *Doe v. Marshall*, 459 F. Supp. 1190 (S.D. Tex. 1978).

[16] *Davis v. Meek*, 344 F. Supp. 198 (N. D. Ohio 1972); *Hollon v. Mathis Indep. School Dist.*, 358 F. Supp. 1269 (S. D. Tex. 1973); *Moran v. School Dist. #7, Yellowstone Cty.*, 250 F. Supp. 1180 (D. Mt. 1972).

[17] *Mitchell v. Louisiana High School Athletic Ass'n*, 430 F.2d 1155 (5th Cir. 1970), at 1158.

[18] *Burtt v. Nassau County Athletic Ass'n*, 421 N.Y.S.2d 172 (N.Y. Sup. Ct. 1979).

[19] See *Duffley v. New Hampshire Interscholastic Athletic Ass'n, Inc.*, 446 A.2d 462 (N.H. 1982).

[20] See *Blue*, fn. 2 *supra*; *Mahan v. Agee*, 652 P.2d 765 (Okla. 1982).

[21] *Snow v. New Hampshire Interscholastic Athletic Ass'n, Inc.*, 449 A.2d 1223 (N.H. 1982).

[22] *Davis v. Central Dauphin School Dist.*, 466 F. Supp. 1259 (M.D. Pa. 1979).

[23] *Ademek v. Pennsylvania Interscholastic Athletic Ass'n*, 426 A.2d 1206 (Pa. Commw. Ct. 1981); but see *University Interscholastic League v. Payne*, 635 S.W.2d 754 (Tex. App. 1982).

[24] *Florida High School Activities Ass'n v. Thomas*, 409 So.2d 243 (Fla. App. 1982).

[25] *Breen v. Kahl*, 419 F.2d 1034 (7th Cir. 1969).

[26] *Dunham v. Pulsifer*, 312 F. Supp. 411 (D. Vt. 1970).

[27] 20 U.S.C. §§ 1681 (1982).

[28] *Id.*

[29] *Haffer v. Temple University*, 524 F. Supp. 531 (E.D. Pa. 1981), *aff'd*, 688 F.2d 14 (3d Cir. 1982); *Grove City College v. Harris*, 500 F. Supp. 253 (W.D. Pa 1980), *aff'd in part, rev'd in part, sub nom* *Grove City College v. Bell*, 687 F.2d 684 (3d Cir. 1982), *cert. granted*.

[30] *Hillsdale College v. Department of Health, Education, and Welfare*, 696 F.2d 418 (6th Cir. 1982) U.S. app. pending; *University of Richmond v. Bell*, 543 F. Supp. 321 (E.D. Va. 1982); *Othen v. Ann Arbor School Bd.*, 507 F. Supp. 1376 (E.D. Mich. 1981).

[31] 102 S. Ct. 1912 (1982).

[32] *Grove City College v. Bell*, see fn. 29 *supra*.

[33] *Hoover v. Mieklejohn*, 430 F. Supp. 164 (D.Conn. 1977).

[34] *Leffel v. Wisconsin Interscholastic Athletic Ass'n*, 444 F. Supp. 1117 (E.D. Wis. 1978).

[35] *Morris v. Michigan State Bd. of Educ.*, 472 F.2d 1207 (6th Cir. 1973).

[36] *Yellow Springs Exempted Village School Dist. Bd. of Educ. v. Ohio High School Athletic Ass'n.*, 647 F.2d 651 (6th Cir. 1981).

[37] *Id.*, at 656.

[38] *Leffel*, fn. 34 *supra*.

[39] *O'Connor v. Board of Educ. of School Dist. #23*, 645 F.2d 578 (7th Cir. 1981), *cert denied,* 454 U.S. 1084 (1982).

[40] *Leffel*, fn. 34 *supra*, at p. 1121.

[41] *O'Connor v. Board of Educ. of School Dist. #23*, 449 U.S. 1301, at 1306 (1980).

[42] *O'Connor*, fn. 39 *supra*.

[43] *Cape v. Tennessee Secondary School Athletic Ass'n*, 563 F.2d 793, at 795 (6th Cir. 1977).

[44] *Jones v. Oklahoma Secondary School Activities Ass'n*, 453 F. Supp. 150, at 155 (W.D. Okla. 1977).

[45] *Dodson v. Arkansas Activities Ass'n*, 468 F. Supp. 394 (E.D. Ark. 1979).

[46] *Karnstein v. Pewaukee School Bd.*, 557 F. Supp. 565 (E.D. Wis, 1983).

[47] 419 U.S. 577 (1975).

[48] *Bernstein v. Menard*, 557 F. Supp. 90 (S.D. Va. 1982).

[49] *Id*. at 558.

[50] *Albach v. Odle*, 531 F.2d 983 (10th Cir. 1976); *Kulovitz v. Illinois High School Ass'n*, 462 F. Supp. 875 (N.D. Ill. 1978).

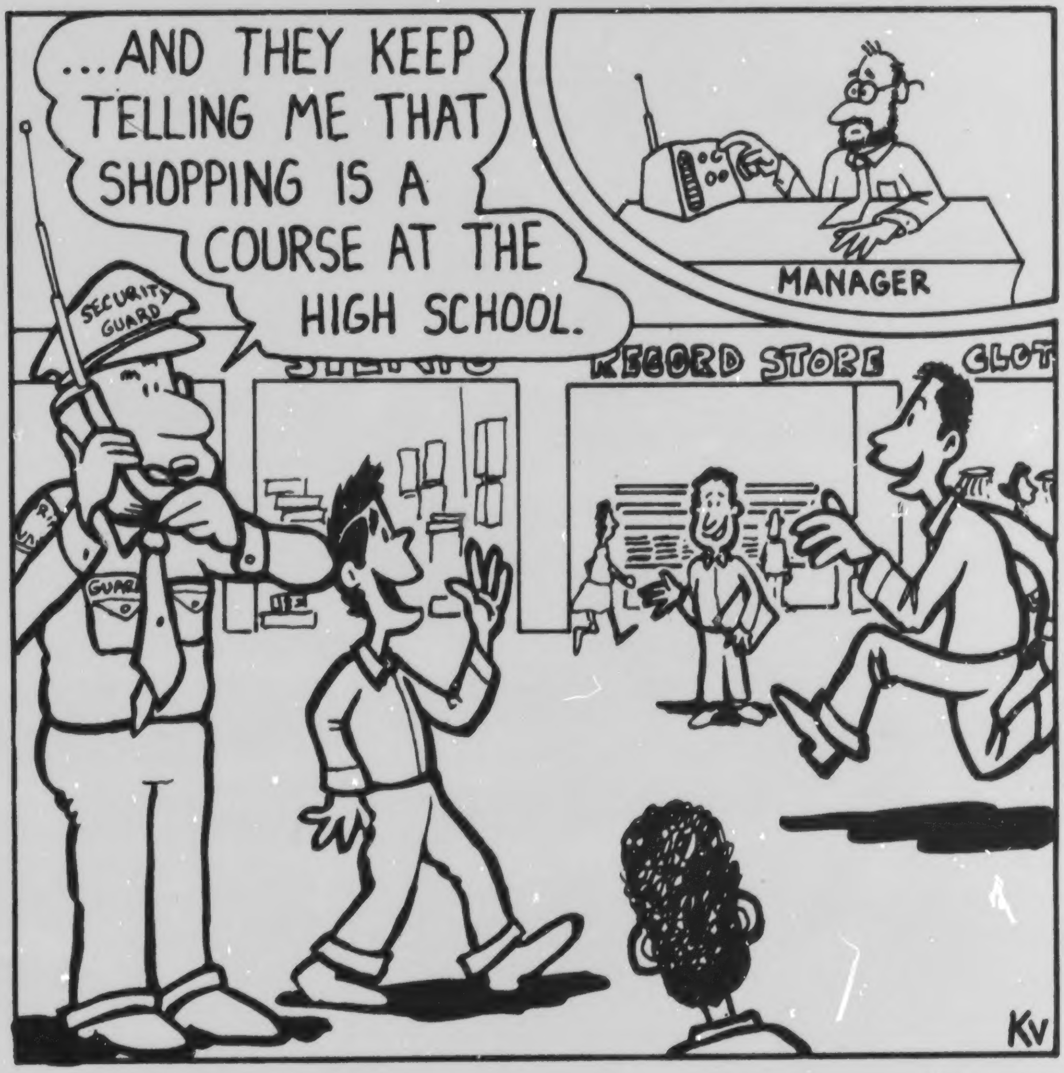
[51] *Waught v. Board of Trustees of the Univ. of Mississippi*, 237 U.S. 589 (1914).

[52] *Holgroyd v. Eibling*, 188 N.E. 2d 797 (Ohio App. 1962); *Burkitt v. School Dist. #1, Multnomah Cty.*, 246 P.2d 566 (Or. 1952); *Isrig v. Spygley*, 197 S.W.2d 39, at 46 (Ark. 1946); *Wilson v. Abilene Indep. School Dist.*, 190 S.W. 406 (Tex. Civ. App. 1945); *Coggins v. Board of Educ.*, 28 S.E.2d 527 (N.C. 1944); *Satan Fraternity v. Board of Public Inst.*, 22 S.2d 892 (Fla. 1945); *Hughes v. Caddo Parish School Bd.*, 57 F. Supp. 508 (W.D. La. 1944); *Webb v. State Univ. of New York*, 125 F. Supp. 910 (N.D. N.Y. 1954); *Robinson v. Sacramento City Unified School Dist.*, 53 Cal. Reptr. 781 (Cal. App. 1966).

[53] *Wright v. Board of Education*, 246 S.W. 43 (Mo. 1922).

CHAPTER 7

COMPULSORY ATTENDANCE


...AND THEY KEEP TELLING ME THAT SHOPPING IS A COURSE AT THE HIGH SCHOOL.
SECURITY GUARD
GUARD
MANAGER
RECORD STORE
CLOT
KV

1. For what reasons may a child be excused from compulsory school attendance?

2. What constitutes a private school for purposes of the statute requiring children to attend public or private schools?

3. What constitutes adequate "home instruction" as an alternative to public or private school education?

4. How may a school penalize a child for truancy?

5. May a pupil be denied credit for a course solely because of the pupil's unexcused absences from school?

6. When may children be charged tuition to attend public school?

7. Do all children have to be immunized before they will be permitted to attend school?

8. May pregnant students or married students be excluded from school?

I. Statutory Requirement of Compulsory Attendance.

Wisconsin's compulsory school attendance statute, Wisconsin Statute § 118.15, requires all children between the ages of 6 and 18 "to attend school regularly during the full period and hours that the public or private school in which the child should be enrolled is in session until the end of the school term, quarter or semester of the school year in which the child becomes 18 years of age."[1] The state legislature has made it clear that children with exceptional educational needs are covered by the requirements of this law.[2] The compulsory school attendance law puts the burden on any person having a child under his or her control to ensure that the child attends school. Parents or guardians who do not comply with the law may be guilty of a misdemeanor punishable by a fine and/or imprisonment. There are, however, several exceptions to the compulsory attendance requirement; these are discussed later in this section.

Alternatives to Traditional Public Education. The Wisconsin compulsory school attendance law provides a number of alternatives to traditional public education. One such alternative is attendance at a vocational, technical, and adult education school (VTAE).

> Upon the child's request of the school board and with the written approval of the child's parent or guardian, any child who is 16 years of age or over may attend, in lieu of high school or on a part-time basis, a vocational, technical, and adult education school.[3]

The cost of the pupil's education at the VTAE is to be paid by the pupil's home school district. The cost to the home school district may include transportation, board, and lodging expenses as well as tuition and fees.[4] The VTAE must provide the pupil with courses for which credit will be given to meet high school graduation requirements.[5] Some VTAE schools, unfortunately, do not design programs for high school students, arguing that their mission is to serve older students. Some school districts decline to approve the transfer.

A second alternative permitted under the compulsory school attendance law involves the modification of a pupil's program or curriculum. A pupil's parent or guardian (or the pupil if the parent or guardian is notified) may request a program or curriculum modification. Permissible modifications include, but are not limited to, the following:

> 1. Modifications within the child's current academic curriculum.
>
> 2. A school work training or work study program.
>
> 3. Enrollment in any alternative public school or program located in the school district in which the child resides.
>
> 4. Enrollment in any nonsectarian private school or program located outside the school district in which the child resides, which complies with the requirements of 42 U.S.C. 2000d. [This is Title VI, which prohibits discrimination on grounds of race, color, or national origin under any program or activity receiving federal financial assistance.] Enrollment of a child under this subdivision shall be pursuant to a contractual agreement which provides for the payment of the child's tuition by the school district.
>
> 5. Home-bound study, including nonsectarian correspondence courses or other courses of study approved by the school board or

nonsectarian tutoring provided by the school in which the child is enrolled.

6. Enrollment in any public educational program located outside the school district in which the child resides.[6]

The law does not require a school board to grant a request for a program or curriculum modification but, if a child's parent or guardian is not satisfied with a decision made in response to a modification request, he or she may request that the school board review the decision and render their final determination in writing.[7] It is possible that the parent or guardian could obtain limited review of the board's final decision in circuit court on a writ of certiorari.[8] Therefore, the school board should articulate a clear rationale, including underlying policy considerations, for any negative decision. Also, the "exhuastion of administrative remedies" doctrine would, in most cases, require school board review to be sought prior to resorting to judicial review. Curriculum modifications must be considered before a child may be prosecuted for truancy and before a child's parents may be prosecuted for failure to send their child to school.[9]

The Supreme Court of the United States has interpreted the Constitution to require a third alternative to traditional school education--private school instruction.[10] In Wisconsin, private school education is expressly recognized in the compulsory attendance statute as an alternative to public education.[11] There is currently a void in Wisconsin law with respect to what will be considered a "private school" for purposes of the compulsory attendance statute. In 1983 the Wisconsin Supreme Court ruled, in State v. Popanz,[12] that the phrase "private school" as used in the compulsory attendance law is impermissibly vague. Consequently, the court held that until the state legislature or the Department of Public Instruction satisfactorily defines what is a "public school," any prosecution under the compulsory school attendance law involving attendance at private schools would be unconstitutional. Until private schools are properly defined, any person can probably avoid a conviction for failure to send a child to school by claiming that the child attends a private school. It is unlikely that the legislature and the Department of Public Instruction will allow this situation to persist for long.

A related alternative provided by Wisconsin law is commonly called "home instruction." The compulsory school attendance law provides the following:

> Instruction during the required period elsewhere than at school may be substituted for school

> attendance. Such instruction must be approved by the state superintendent as substantially equivalent to instruction given to children of like ages in the public or private schools where such children reside.[13]

Case law in the area of home instruction in Wisconsin, as well as in the rest of the United States, seems to indicate that the substantial equivalency requirement of the home instruction alternative will not be held to be too vague to be enforceable. A parent may be entitled to seek judicial review of a state superintendent decision denying approval of a proposed home instruction program.[14] Once the superintendent has decided, or a final determination on appeal has been made that a program of home instruction is not "substantially equivalent" to regular school instruction, a parent who continues to keep a child at home may be prosecuted under the compulsory attendance laws.

The final alternative to traditional public education provided for by Wisconsin law is designed to meet the special needs of exceptional children. Children with exceptional educational needs may fulfill the requirements of the compulsory school attendance law by attendance in "special education programs operated by a school district, county handicapped children's board, board of control of a cooperative educational service agency, state or county residential facility or private special education service."[15] It should be noted that any alternative provided under this section must comply with relevant state and federal laws requiring equal educational opportunity for exceptional children. These laws are discussed in Chapter 9.

Exceptions to Compulsory School Attendance. The state legislature and the federal courts have carved out several exceptions to the compulsory attendance statute. A narrow exception was created by the United States Supreme Court for Amish youth under the free exercise clause of the first amendment. In addition to the Constitutional exception, the state legislature has recognized several other special circumstances which warrant exemption from the compulsory attendance statute.

In 1972 the United States Supreme Court held in *Wisconsin v. Yoder*[16] that enforcing Wisconsin's compulsory attendance statute against Amish parents violated the free exercise clause of the first amendment. The Supreme Court recognized that the state indeed has a compelling interest in educating its youth. Nevertheless, in the special circumstances presented by the *Yoder* case the Court found that the state's interest was outweighed by the parents' interest in the free exercise of their religion. The *Yoder* decision established criteria for a religious-based exception to compulsory attendance laws which are sufficiently stringent to preclude almost any religious group other than the Amish from qualifying for the exception. The following factors seem to be critical to the Court's decision:

1. History of the religion. The Court noted that the Amish have a long tradition in the United States. The history of the Amish as an identifiable religious sect with an established dogma and a community of believers or adherents to that dogma seems to be essential to the Court. The implication is strong that less "traditional" religions are not eligible for the exception.

2. The nature of the belief. The Supreme Court made it clear in Yoder that only "religious" and not personal, philosophical, or ideological beliefs are protected by the free exercise clause of the first amendment. "A way of life, however virtuous or admirable, may not be interposed as a barrier to reasonable state regulation of state education if it is based on purely secular considerations; to have the protection of the Religion clauses, the claims must be rooted in religious belief."[17] Thus only if the religion itself has a tenet which is violated or endangered by the compulsory attendance law will this type of exception be made.

3. The interrelationship between the religious belief and the daily mode of living. An abstract religious belief which conflicts with the compulsory attendance statute is not sufficient to avoid enforcement of the statute on religious grounds. In Yoder, the Amish argued that their way of life was dictated by their religion and endangered by the secular education of their children. The fact that the Amish were largely insulated from secular society and did incorporate their daily beliefs into their daily lives carried great weight with the Court. The Court accepted the argument that the exposure of Amish adolescents to secondary school "substantially interfer[ed] with the religious development of the Amish child and his integration into the way of life of the Amish faith community."[18]

4. The self-sufficiency of the Amish. Preparing youth for gainful employment and for

participation in the society are major purposes of compulsory attendance laws. In Yoder the Court noted that the Amish are largely independent of the rest of society. They are exempt from Social Security Act taxes because they do not accept Social Security benefits. Their communities are self-sufficient, operating without government support. The Amish communities are primarily agrarian; the training that the youth need to participate in the government and maintenance of the Amish community can be effectively provided by that community. In short, the Court found that the purposes of the compulsory attendance statute were adequately served by the informal, social, and vocational training provided by the Amish community.

In Yoder the Supreme Court found that the free exercise interests of the Amish outweighed the state's interest in requiring school attendance of Amish youth beyond the eighth grade. It is, however, unlikely that many, if any, other religious groups could meet the criteria established in Yoder for religious exemption from compulsory attendance laws.

There is every indication that the Yoder standards will be narrowly applied, as the United States Supreme Court intended. In 1978 the Wisconsin Supreme Court ruled that parents could not avoid the requirements of Wisconsin's compulsory attendance statute by claiming that the public school curriculum violated their "religious" beliefs regarding white supremacy, capitalism, and humanism. The court viewed these beliefs as "ideological or philosophical beliefs rather than fundamentally religious beliefs."[19]

In addition to the constitutionally required religious exception, the state legislature has recognized the following four exceptions to the compulsory school attendance statute·

1. High school graduation. Any child who is under 18 years of age but who has graduated from high school is exempted from compulsory school attendance.[20]

2. Limited exception for children over 16. A child who is 16 or older but who has not graduated, must, upon request, be excused from school attendance in Wisconsin as follows:

   Upon the child's request and with the written approval of the child's parent or guardian, any child who is 16 years of age or over shall be excused by the school board from school attendance. A child who is excused from school attendance under this paragraph shall be informed by the school board of the availability of programs within the vocational, technical, and adult education system and of the child's right to be readmitted to school upon request. The school board may specify when the child will be excused or readmitted after being excused from school attendance.[21]

In other words, a 16 year old may drop out of school if the parent or guardian consents in writing. This compromise provision was necessary to secure the passage of the uniform age 18 requirement for compulsory school attendance.

3. Good cause. Section § 118.15(3)(b) of Wisconsin's compulsory attendance law provides that a child of any age may be excused from school attendance for "good cause." Unlike the exemption for children 16 and older, the provision gives the school board discretion over whether or not to excuse the child, requires the excuse to be based on good cause, and limits the duration of the excuse to one year (although the statute does not prohibit a child from being excused more than once). Both this provision and the provision for children 16 and older require the written approval of a parent or guardian.

   Strictly speaking, "good cause" excuses apply to any absence from attendance acceptable to the board (or, by delegation, the school administrator) which is not expressly provided for under Wisconsin Statutes § 118.15. This is a catch-all provision vesting broad discretion in the school board, subject to parental consent. Although we are not accustomed to thinking of them as such, deer hunting, family vacations, death in the family, and so forth, can be good cause excuses. In these situations, parental consent is typically provided after the fact by a parent's note explaining the reason for the absence. School boards must establish a written attendance policy specifying acceptable reasons for good cause absences from school.[22]

Good cause for an excuse under this provision may not be based upon the child's exceptional educational needs. While an excuse for good cause must be in writing and must state the time period for which it is effective, the statute does not seem to require that the reason for the excuse be recorded. However, a statement of reasons is advisable for long term excuses, particularly those which are for unusual reasons, since a parent may later seek to revoke consent and challenge the excuse as arbitrary and capricious. Contemporary statements of the rationale generally are accorded more weight than after-the-fact explanations offered once litigation has commenced.

School boards may find the excuses for good cause or those for children 16 or older to be attractive alternatives to expulsion. First, a child may be excused from school only if the child's parent or guardian and the school board agree. Consequently the excuse process does not require the formal notice, hearing, and appeal procedures which are required for expulsion. Second, a school board probably has some obligation to provide for the education of an expelled student,[23] while it has no similar obligation to children who have been excused from school attendance. Caution is in order for disciplinary removals under the good cause provision, however, since under the rule of ejusdem generis (that is, a specific statute controls in case of conflict with one of general application), it may be argued that Wisconsin Statutes §§ 120.13(1)(b) and (c) provide the exclusive means for removing disruptive students in the forms of suspension and expulsion. Therefore, districts which are determined to use "good cause" in this grey area would be well advised to include, in the parent consent form, a statement to the effect that the parent has been provided with a copy of Wisconsin Statutes §§ 120.13(1)(b) and (c), understands the rights accorded, and freely waives them. It would also be advisable for the student to sign this form. Many school districts' long standing practices to the contrary are not necessarily lawful.

The excuse process may also be an attractive option for students who might otherwise risk prosecution for truancy. At the school's discretion, a child who would otherwise be truant may be excused from attendance, thus avoiding the legal and social implications of truancy. Again, words of caution are in order. Excusing from attendance a student who habitually violates compulsory attendance laws can be argued to be contrary to the manifest intention of the legislature. Such excuses are subject to charges of arbitrariness or capriciousness and abuse of discretion.

Where members of particular social classes or racial groups have been disproportionately subjected to exclusionary discipline, courts have sometimes found constitutional and statutory violations. School boards should be careful to ensure that minorities are not disproportionately excused from school attendance.

4. Physical or mental condition. A school board may excuse a child from school attendance if the child is temporarily not in proper physical or mental condition to attend school or a special education program but the child can be expected to return to school or the program once he or she is better. The school attendance officer might require a statement from the physician, dentist, chiropractor, optometrist, psychologist, or Christian Science practitioner as proof of the child's physical or mental condition. An excuse under this provision must be in writing and it must state the time period for which the excuse is valid. Such an excuse is valid for only 30 days at the most, but there is no restriction on the number of times a child can be excused.[24]

Accommodation of Religious Practices. As discussed in the previous section, children will be exempted from compulsory school attendance in the rare case that the parents' first amendment interests in the free exercise of their religion outweigh the state's interest in the education of all children. In addition, Wisconsin law provides certain accommodations for religious practices. The compulsory school attendance statute expressly excepts religious holidays from the days which children are required to attend school.[25] Wisconsin also has a released time for religious instruction statute[26] which requires school boards to permit pupils, with written permission of a parent or guardian, to be absent from school for one to three hours per week to obtain religious instruction outside the school during the required school period. The school board decides for what time periods the children may be absent from school for this purpose. A school board may deny a child the privilege of released time if the child fails to attend religious instruction after requesting the privilege. The school district is not responsible for the transportation of children between school and the place of religious instruction, and the statute releases the school district from all liability for a pupil who is absent from school under the released time provision.

II. Truancy and Parental Violations of the Compulsory School Attendance Law.

Wisconsin Statute § 118.16 provides for the enforcement of compulsory school attendance. Under the statute, "truancy" is defined as "any absence of part or all of one or more days from school during which the school attendance officer, principal, or teacher has not been notified of the legal cause of such absence by the parent or guardian of the absent pupil, and also means intermittent attendance carried on for the purpose of defeating the intent of Section § 118.15."[27] Thus, "truancy" includes the occasional class cutter as well as the student who is absent without excuse for one or more days. School boards must establish a written attendance policy specifying the reasons for which pupils may be absent from public school. Copies of the attendance policy should be disseminated to each pupil enrolled in the district's public schools and must be made available upon request.

All teachers in Wisconsin are required by law to record the daily attendance of all pupils under their charge.[28] The school attendance officer has the duty to "determine daily which pupils enrolled in the school district are absent from school and whether that absence is excused under Section § 118.15."[29] The attendance officer must notify the parent or guardian of the child's truancy and direct the parent or guardian either to return the child to school by the next school day or to provide an "excuse" for the child's absence. The "excuse" provided by the parent is more properly viewed as an explanation of the reason for absence since the decision as to whether or not the absence will be excused for school attendance enforcement purposes rests with the school district.

School Enforcement of Compulsory Attendance. Wisconsin Statute § 118.16 expressly prohibits the public school from denying a pupil credit in a course or subject solely because of the pupil's unexcused absences from school. The statute allows school boards to establish policies which utilize detention as a deterrent to truancy.[30] Beyond these two provisions, the law is silent on what method schools may use to punish truancy. Typical deterrents in addition to detention and denial of credit include automatic grade reduction and suspension followed by expulsion. The last two are probably not permissible in Wisconsin. This is so because compulsory attendance is a penal statute providing for legal sanctions against violators. In legal terms, penal statutes are to be strictly construed in accordance with their terms. Punishment other than as expressly provided for in such statutes will rarely be sanctioned on review by the courts.[31] In April 1983, a bill was introduced in the State Senate to amend the school attendance enforcement statute to permit grade reductions and credit denials because of a pupil's unexcused absences from school.[32]

Judicial Enforcement of Compulsory Attendance. A child who is habitually truant from school may be proceeded against in juvenile court.[33] A parent or guardian who fails to send his or her child to school as required by law may be prosecuted in circuit court and fined from $5 to $50 or imprisoned up to three months or both.[34] The institution of proceedings against a child in juvenile court for habitual truancy does not preclude concurrent prosecution of the child's parent or guardian for failure to send the child to school.[35] An action against the parent or guardian will be dismissed upon proof that the child's disobedience precluded the parent or guardian's compliance with the law. Upon such proof, the child will be referred to the juvenile court if that has not been done already.[36]

While it is clear that a child or his or her parent may be punished for the child's truancy, a very important aspect of Wisconsin law is that the initial burden is on the schools to remedy the truancy problem. Before a child may be referred to the juvenile court for habitual truancy and before a parent or guardian may be prosecuted for violation of the compulsory school attendance law, the school must take affirmative steps to investigate and remedy the cause of the child's truancy. Within one year prior to the institution of any judicial proceedings, appropriate school personnel must:

1. meet or try to meet with the child's parent or guardian to discuss the child's truancy;

2. provide the child with an opportunity for educational counseling to determine whether a change in the child's curriculum would resolve the truancy and, if so, consider curriculum modification;

3. evaluate the child to determine whether learning problems may be a cause of the

truancy and, if so, take steps to overcome the learning problems; and

4. conduct an evaluation to determine if social problems may be a cause of the truancy and, if so, take appropriate action or make appropriate referrals.[37]

By its terms, the statute suggests that these four conditions preceeding truancy prosecution or juvenile court referral are absolute. This does not mean that parents or students may avoid court action by refusing to participate in or make themselves available for such activities. Although no appellate decision has reached this issue, several unreported circuit court decisions have concluded that an absolute requirement for completion of the four conditions would work an absurd result and frustrate the purposes of the statute in such situations. Otherwise, the uncooperative parent or student could veto his or her own prosecution by simply refusing to participate in meetings and evaluations. Therefore, these courts have held it is sufficient compliance with the statutory conditions before prosecution when the district makes a good faith effort to arrange for the requisite meetings and evaluations but is thwarted by actions of the parents or student. In order to demonstrate such good faith efforts, districts are advised to notify the parents in writing of the need to explore the four areas outlined above (explaining each) and specifying a time and place for any meetings. The letter should place the burden on the parent for making schedule changes, and a log of missed appointments should be maintained. Several attempts of this nature are advisable so that a clear track record is established before referral.

III. Free Education for Resident Students

The Constitution of the State of Wisconsin requires district schools to be "free and without charge for tuition to all children between the ages of 4 and 20" residing in the district.[38] Both this provision and the Wisconsin Statute echoing the constitutional requirement of free public education[39] are silent on the question of what constitutes residency entitling a child to a free education. The Wisconsin Attorney General has said that as soon as a family moves into a school district with the intention of making it their home they acquire a residence there for school purposes.[40]

Statutes entitling residents of school districts to free public education are generally construed broadly, evidencing the state's intention to provide all children within its borders the opportunity for a free education. In summarizing case law in the area, American Jurisprudence states:

> Residence entitling an infant to school privileges is distinguished from domicile or the technical and narrow use of the term "residence" for the purpose of suffrage or other like purposes, and is construed in a liberal sense as meaning to live in or be an inhabitant of a school district, the purpose being not to debar from school privileges any child of school age found within the school district under the care, custody, or control of a resident thereof. [Citations omitted.][41]

In accordance with a preference for a liberal definition of residency, the Attorney General of Wisconsin has said that school-age children, located in a school district for the primary purpose of making their home in the district while their parent is working there, are to be regarded as residents of the school district for school purposes. This is so even if the family has no intention of establishing a "residence" in the district and intends to return home when the parent's work has been completed.[42] Similarly, the Wisconsin Department of Public Instruction considers the children of migrant workers to be residents of the school district in which they live while their parents are working in Wisconsin, thus entitling the children to free public education in the district.

In practice, the issue of residency is rarely raised in the case of entire families moving from one district to another; the common question arises when children are living in a district without parents or legal guardian. The law on the subject was settled in Wisconsin by the early case of State ex rel School District #1 v. Thayer[43] which adopted the liberal, so called "New Hampshire" rule of school residence for tuition purposes. Thayer involved a young mother who had been abandoned by her husband. Although she was able to find work as a teacher in Milwaukee, she was unable to maintain a home and support her children on her meager salary so she sent her children off to live with a friend in Waukesha. The Waukesha district, however, refused the youngsters' admission absent tutition payment, claiming their legal residence remained that of the mother. In ruling in favor of the children, the court observed that by establishing the district schools, the legislature sought to achieve universal education of the state's youth. Adoption of strict legal residence as the standard for school admission would frustrate this purpose where children are living away from home for legitimate reasons. Thus, the court found that "simple residence" was sufficient for admission provided that children were not sent away from home simply out of preference for one school over another. The court observed that this condition was necessary lest a disincentive be created for communities which would otherwise maintain "superior schools of high order," apparently fearing that a wholely unfettered residence rule would result in a burdensome influx of unaccompanied children seeking better schools. Thus, under the Thayer rule, a child unaccompanied by parent or guardian is a resident for school purposes if:

1. the child is actually living in the district (i.e. bed and board), and
2. the child is present in the district for a primary purpose other than to attend school in that district.

Thayer remains the law in Wisconsin.[44]

In 1982 the United States Supreme Court, in Plyler v. Doe,[45] ruled unconstitutional a Texas statute prohibiting the use of state funds to educate undocumented alien school age children and authorizing school districts to deny such children enrollment in the district's public schools. Based on this statute, the State of Texas had refused to reimburse local school boards for the education of illegal alien children and local school boards had charged these children tuition as a prerequisite to enrollment in their schools.

The Supreme Court, finding that the equal protection clause of the fourteenth amendment applies to illegal aliens, held that no substantial state interest was furthered by the Texas policy denying "a discrete group of innocent children the free public education that it offers to other children resident within its borders."[46] The Court specifically rejected the state's claim that its interest in the "preservation of the state's limited resources for the education of its lawful residents" was a sufficient justification for the disparate treatment of illegal aliens. In addition, the Court found that the Texas statute could not be justified as a means for mitigating the potentially harsh economic effects of illegal immigration, since the state could utilize more effective methods to deter such immigration. Texas has since adopted a statute requiring district residence for admission and defining residence in terms of the "simple residence" rule of Thayer. This statute was upheld by the United States Supreme Court against challenges by the same interests as were present in the earlier Plyler case.[47]

A school board may admit nonresident pupils if the school district's facilities are adequate.[48] The school board must make a written agreement with the nonresident pupil's parents for the payment of tuition before the child will be admitted to school in the district. The parents are responsible for their nonresident child's transportation to and from school.[49] The amount to be charged for tuition must be computed according to the method described in Wisconsin Statute § 121.82. The Wisconsin Statutes permit tuition to be waived in certain cases, such as where the nonresident pupil's parent or guardian establishes residence in the school district within a specified time after the child is enrolled,[50] or when a resident pupil's parents move out of the school district during the second semester of the school year in which case tuition may be waived only for the remainder of that school year.[51] Tuition may also be waived for students who attain senior status before moving out of the district.[52] The State Department of Public Instruction interprets senior status as occuring upon completion of 11th grade studies. Thus, a student who moves in the summer months after finishing 11th grade has attained senior status and may finish school without tuition. Under certain circumstances specified by statute, a nonresident pupil's tuition might be paid by the school district in which the child resides,[53] by the county in which the child's parents reside,[54] or by the state.[55]

The Milwaukee School System is regulated by a separate set of statutes from those which apply to the rest of the state. However, the provisions for free public education and for the admission of nonresident students are substantially the same for Milwaukee as for the rest of Wisconsin.

IV. Immunization

Courts typically uphold state statutes which require immunization of pupils as a prerequisite of school attendance. A parent may be subject to prosecution under compulsory attendance laws for failure to send his or her child to school if the school declines to admit the child because of the parent's refusal to allow the child to be immunized. Wisconsin law is unusual in that it provides a virtually unlimited exemption from its requirement of immunization. The state must waive the immunization requirement if an adult student or a minor student's parent or guardian objects to immunization "for reasons of health, religion, or personal conviction."[56] Children who have not been immunized for a particular disease may be excluded from school if a substantial outbreak of the disease arises in a school or in a municipality in which the school is located.[57]

Within 30 school days after being admitted to school, a student must present written evidence of receipt of the appropriate immunizations, or a written waiver of immunization.[58] The school board may exclude a first time admittee from school for failure to comply with this requirement.[59] In addition, the state may impose a fine for noncompliance.[60]

V. Married Students and Pregnant Students

The majority of courts today hold that students cannot be excluded from school or from extracurricular activities because they are married. The Wisconsin compulsory school attendance statute expressly prohibits compelling a pregnant girl to withdraw from her regular education program.[61]

VI. Summary.

There is no more frustrating area for school personnel to address than repeated truancy. In part, this is due to conflicting values present in schools regarding students who do not attend. Because these students are sometimes disruptive when they are present, there is a tendency to overlook unexcused school absences and to characterize the truant student as a troublemaker not interested in the educational process. At the same time, the Wisconsin Statute on truancy focuses on the school as the source of truancy, asking the school to demonstrate that it is not the cause by failing to meet the student's needs. Truancy, then, leads to much blaming and finger pointing, with insufficient discussion about the ways in which schools should address the problem.

It is clear that schools can address the problems of truancy and dropping out, though not without devoting staff time and other resources to the effort.[62] Some Wisconsin school districts already have successful programs which are aimed at students most likely to leave school, either permanently or for shorter periods.[63] Other schools seek to readmit students who have left and discovered that life "on the outside" is not what they imagined it would be. In all of these successful programs and efforts, truancy is seen as a symptom, rather than as the problem itself.

There is no pat cure for truancy. Both district attorneys and courts have heavy caseloads and limited staff; they rightly place more importance on cases such as rape, murder, and armed robbery than on complaints of truancy. However, early communication between the school, prosecutors, and judges can sensitize these parties to the problem and can result in coordinated programs where alternative avenues are explored before the problem cases arise. A model program was established in LaCrosse as a result of such efforts at early communication. There, the court has appointed a lay panel composed of persons from various community, school, and related organizations. The panel hears initial truancy cases, determines causes, and defines a prescription for correcting the problem. This relieves the D.A. and courts of involvement in each case that comes up. However, if the truant fails to follow through on the panel's program, the courts and D.A. agree to prompt and complete action on the referral. In sum, school systems must decide to systematically address the question, or face the prospect that chronic truancy will continue.

NOTES

[1] Wis. Stat. Ann. § 118.15(1)(a) (1981).

[2] Wis. Stat. Ann. § 115.82 (1981).

[3] Wis. Stat. Ann. § 118.15(1)(b) (1981).

[4] Wis. Stat. Ann. §§ 118.15(2)(b)2 and 118.15(d) (1981).

[5] Wis. Stat. Ann. §§ 118.15(2)(b)2 and 118.15(2)(b)1 (1981).

[6] Wis. Stat. Ann. § 118.15(1)(d) (1981).

[7] Wis. Stat. Ann. § 118.15(1)(e) (1981).

[8] Wis. Const. Art. 7 § 8; *State ex rel. Thompson v. Nash*, 27 Wis 2d 183, 133 N.W. 2d 769 (Wis. 1965).

[9] Wis. Stat. Ann. § 118.16(5)(b) (1981).

[10] *Pierce v. Society of Sisters*, 268 U.S. 510 (1925).

[11] Wis. Stat. Ann. § 118.15(1)(a) (1981).

[12] 81-1493-CR (1983).

[13] Wis. Stat. Ann. § 118.15(4) (1981)

[14] Wis. Stat. Ann. § 227.15 (1981). For review procedures and timeliness, see Wis. Stat. Ann. §§ 227.16-227.21 (1981).

[15] Wis. Stat. Ann. § 115.82 (1981).

[16] 406 U.S. 205 (1972).

[17] *Wisconsin v. Yoder*, 406 U.S. at 215.

[18] *Id*. at 218.

[19] *State v. Kasuboski*, 87 Wis. 2d 407, 275 N.W. 2d 101 (Wis. 1978).

[20] Wis. Stat. Ann. § 118.15(1)(a) (1981).

[21] Wis. Stat. Ann. § 118.15(1)(c) (1981).

[22] Wis. Stat. Ann. § 118.16(4) (1981).

[23] *Student Rights in Wisconsin Public Elementary and Secondary Education* (Madison: Department of Public Instruction, 1977).

[24] Wis. Stat. Ann. § 118.15(3)(a) (1981).

[25] Wis. Stat. Ann. § 118.15(1)(a) (1981).

[26] Wis. Stat. Ann. § 118.155 (1981).

[27] Wis. Stat. Ann. § 118.16(1)(b) (1981).

[28] Wis. Stat. Ann. § 118.18 (1981).

[29] Wis. Stat. Ann. § 118.16(2)(a) (1981).

[30] Wis. Stat. Ann. § 118.16(4) (1981).

[31] See Max C. Ashwill, "Legal Corner," *Newsletter*, State of Wisconsin Department of Public Instruction, May, 1976; James F. Clark, "Legal Comments," *Wisconsin School News*, April, 1978.

[32] 1983 Senate Bill § 224.

[33] Wis. Stat. Ann. § 48.13 (1981).

[34] Wis. Stat. Ann. § 118.15(5) (1981).

[35] Wis. Stat. Ann. § 118.16(6) (1981).

[36] Wis. Stat. Ann. § 118.15(5) (1981).

[37] Wis. Stat. Ann. § 118.16(5) (1981).

[38] Wis. Const. Art. 10 § 3.

[39] Wis. Stat. Ann. § 121.77 (1981).

[40] 24 *Op. Wis. Att'y Gen*. 602 (1935).

[41] 8 Am Jur. 2d § 220.

[42] 18 *Op. Wis. Att'y Gen*. 549 (1929).

[43] 74 Wis. 48 (Wis. 1889).

[44] See also, 28 *Op. Wis. Att'y Gen*. 549, 551 (1939); see also *Kidd v. Joint School District*, 194 Wis. 353, 216 N.W. 2d 499 (Wis. 1927); *State ex rel. Smith v. Board of Education of City*

of Eau Claire, 96 Wis. 95, 71 N.W. 2d 123 (Wis. 1897); *Martinez v. Bynum*, 103 S.Ct. 1838 (1983).

[45] 102 S.Ct. 2382 (1982).

[46] *Id*. at 2402.

[47] *Martinez v. Bynum*, 103 S.Ct. 1838 (1983).

[48] Wis. Stat. Ann. § 121.77 (1981).

[49] Wis. Stat. Ann. § 121.81 (1981).

[50] Wis. Stat. Ann. § 121.81(2) (1981).

[51] Wis. Stat. Ann. § 121.84(1)(a) (1981).

[52] Wis. Stat. Ann. § 121.84(1)(b) (1981).

[53] Wis. Stat. Ann. § 121.78 (1981).

[54] Wis. Stat. Ann. § 121.80 (1981).

[55] Wis. Stat. Ann. § 21.79 (1981).

[56] Wis. Stat. Ann. § 140.05(16)(c) (1981).

[57] Wis. Stat. Ann. § 140.05(16)(e) (1981).

[58] Wis. Stat. Ann. § 140.05(16)(b) (1981).

[59] Wis. Stat. Ann. § 140.05(16)(d)(2) (1981).

[60] Wis. Stat. Ann. § 140.05(16)(d)(1) (1981).

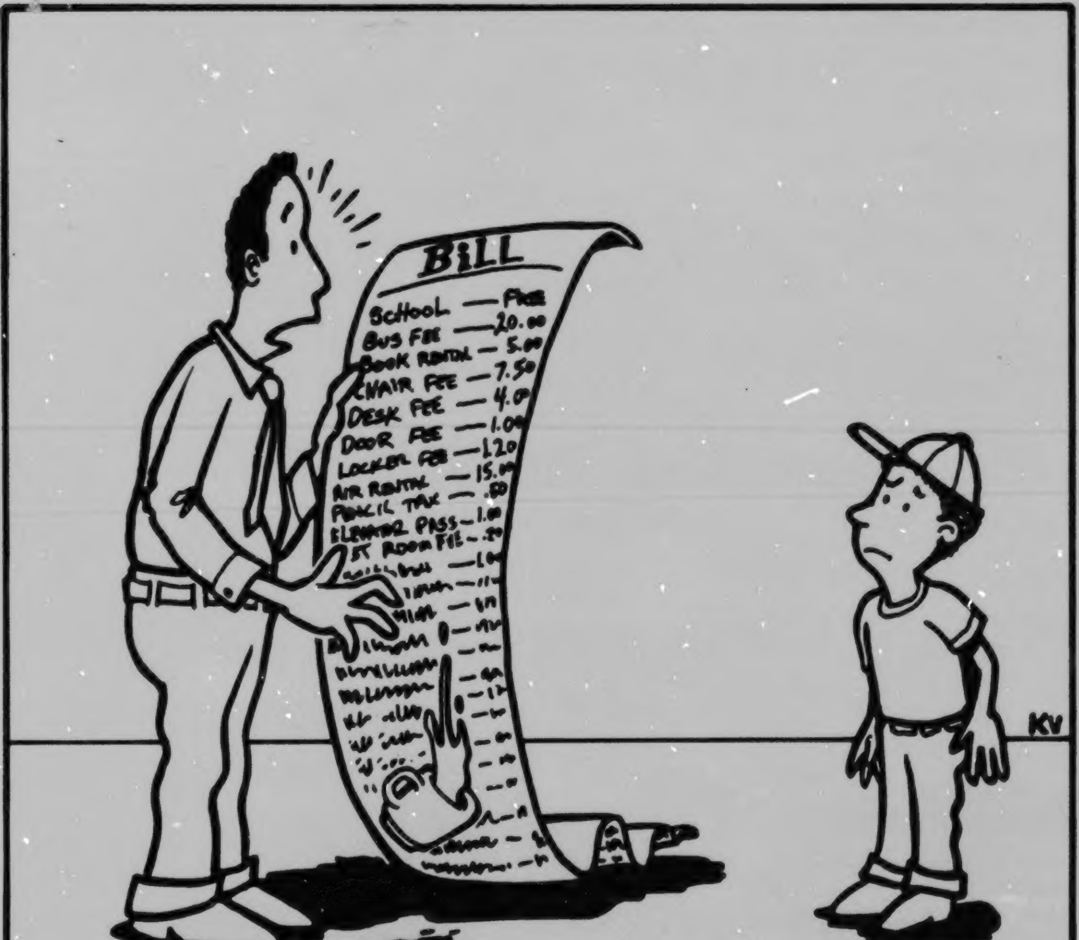
[61] Wis. Stat. Ann. § 118.15 (4m) (1981).

[62] Gary Wehlage, *Effective Programs for the Marginal Student* (Bloomington: Phi Delta Kappa, 1983).

[63] Jan Novak and Barbara Dougherty, eds., *Staying in . . . A Dropout Prevention Handbook K-12* (Madison, Wisconsin: Vocational Studies Center, University of Wisconsin-Madison, 1981).

CHAPTER 8

EQUAL EDUCATIONAL OPPORTUNITY


BiLL
SCHOOL — FREE
BUS FEE — 20.00
BOOK RENTAL — 5.00
CHAIR FEE — 7.50
DESK FEE — 4.00
DOOR FEE — 1.00
LOCKER FEE — 1.20
AIR RENTAL — 15.00
PENCIL TAX — .80
ELEVATOR PASS — 1.00
ST ROOM FEE — .50
KV

1. What implications does the fourteenth amendment equal protection clause have for public school education?

2. What protections do students have under federal and state civil rights legislation?

3. How are educationally deprived children served under Chapter 1 of the Consolidation and Improvement Act of 1981?

4. What services must school districts provide for children with limited English proficiency?

5. What does the law require with respect to the equalization of per pupil expenditures at the district level?

6. May school districts charge students fees for any materials or activities?

7. May school boards impose a requirement that students pass a minimal competency test in order to receive a high school diploma?

In 1954 in the case Brown v. Board of Education of Topeka,[1] the United States Supreme Court held that intentional racial segregation in the public schools violated the equal protection clause of the fourteenth amendment. In subsequent cases the Supreme Court ruled that a finding of intentional discrimination could be based on the actions of state officials (including school officials) where the purpose and effect of those actions was to increase segregation. While desegregation is not included as a topic in this book (primarily because findings of intentional segregation and remedies imposed to eliminate segregation are district specific), an awareness of several of the key concepts of Brown and subsequent cases is essential to an understanding of what the law requires of school districts.

The notion of what constitutes "intentional discrimination" has been fairly well defined in the desegregation cases. Since Brown, a variety of educational policies and practices once considered to be beyond judicial review (e.g., transfer policies, attendance zoning, tracking and ability grouping) have been challenged as discriminatory under the fourteenth amendment. The general rule emerging from these cases is that these policies and practices may violate the equal protection clause if they are accomplished with the purpose and effect of increasing segregation or discriminating against students on the basis of their race.[2] Thus, while the establishment of competency testing programs, ability grouping and tracking procedures, and attendance zones are still within the discretion of school officials, none of these policies and practices may be instituted with the purpose and effect of discriminating against minority students.

The "equality of educational opportunity" concept, first developed in Brown, has served as the basis for both federal and state legislation. Title VI of the Civil Rights Act of 1964[3] prohibits discrimination on the basis of race, color, or national origin in, among other things, educational programs receiving federal financial assistance. Title IX of the Educational Amendments of 1972[4] and § 504 of the Rehabilitation Act of 1973[5] prohibit discrimination based on gender and handicap, respectively, in programs receiving federal assistance. In Wisconsin, discrimination against pupils is prohibited by § 118.13 of the Wisconsin Statutes which provides in part that

> no person may be excluded from or discriminated against in admission to any public school or in obtaining the advantages, privileges, and courses of study of such public school on account of sex, race, religion, physical condition, developmental disability . . . or national origin.

The above listed federal and state legislation prohibits various types of discrimination in public schools. The implications of much of this legislation and relevant case law are discussed elsewhere in this sourcebook. In this chapter, the provisions of Chapter 1 of the Education Consolidation and Improvement Act, the Bilingual Education Act and Wisconsin's Bilingual-Bicultural Education Law are discussed in some detail. These laws establish requirements for the provision of services to particular target groups and provide school districts with financial assistance in implementing these requirements. The implications of the equal educational opportunity requirement of the fourteenth amendment, state and federal laws, and relevant case law for systems of school finance, school fees, and minimal competency testing are also discussed.

I. Federal Financial Assistance To Meet the Special Educational Needs of Disadvantaged Children.

Title I of the Elementary and Secondary Education Act was enacted in 1965. Its objective is to

> provide financial assistance . . . to local educational agencies serving areas with concentrations of children from low-income families to expand and improve their educational programs by various means (including preschool programs) which contribute particularly to

> meeting the special education needs of educationally deprived children.[6]

In recognition of the special educational needs of children of certain migrant parents, of Indian children, and of handicapped, delinquent, and neglected children, Congress amended the law to provide financial assistance "to help meet the special educational needs of such children."[7] In 1981, Congress enacted a revised version of Title I as part of the Education Consolidation and Improvement Act of 1981. Its "Declaration of Policy" includes the objectives of Title I, but contains the additional objective of providing financial assistance in such an way as to "eliminate burdensome, unnecessary, and unproductive paperwork and free the schools of unnecessary federal supervision, direction, and control."[8] This revision of Title I is commonly referred to as Chapter 1.

Chapter 1 assistance is in the form of block grants which must be used by the recipient state and local educational agencies

> for programs and projects (including the acquisition of equipment and, where necessary, the construction of school facilities) which are designed to meet the special educational needs of educationally deprived children.[9]

The Act's regulations define "educationally deprived children" as "children whose educational attainment is below the level that is appropriate for children of their age."[10] The Act covers children of preschool age through age 21 (if they have not completed the twelfth grade). Individual school districts may devise their own methods for determining whether or not a child's educational attainment is below the appropriate level.

A Wisconsin school district which receives Chapter 1 funds must comply with certain requirements of the Act and of its implementing regulations. These requirements are designed to ensure that recipient school districts use Chapter 1 monies to help meet the special educational needs of the educationally deprived children in the district. The major requirements are briefly set out below:

1. School districts must operate Chapter 1 projects in attendance areas having the highest concentrations of low-income children unless the district has a uniformly high concentration of such children, in which case it may operate the projects in all attendance areas. An exception to the requirement of establishing project attendance areas is that a school district may use some Chapter 1 funds to meet

the educational needs of all low-income children in the district even if they are not in "low-income" attendance areas.[11] Because a district may decide where to expend its funds to meet the educational needs of educationally deprived children, an individual child has no absolute right to be included in a Chapter 1 project. Nonetheless, a United States district court in Wisconsin has held that a child has a private right to sue at least for the enforcement of Chapter 1 provisions which are preconditions to the receipt of Chapter 1 funds.[12]

2. Every year, recipient school districts must identify the educationally deprived children in their Chapter 1 project areas and must determine the educational needs of those children.[13]

3. School districts receiving Chapter 1 funds must use the funds "for a project that is of sufficient size, scope, and quality to give reasonable promise of substantial progress toward meeting the special educational needs of the children being served."[14]

4. Recipient school districts must consult with parents and teachers of children being served in order to design and implement Chapter 1 projects. According to the Chapter 1 regulations, the Act no longer requires the establishment of parent advisory councils which were required under Title 1.[15] However, a United States district court in Wisconsin has recently held that Chapter 1 probably incorporates the Title 1 requirement that parent advisory councils be established and consulted prior to the adoption of migrant education programs.[16]

5. At least once every 3 years a school district must evaluate its Chapter 1 programs.[17]

6. Recipient school districts must provide for the "equitable participation" of educationally deprived children residing in a Chapter 1 project area who attend private schools.

7. Chapter 1 expenditures for children in private schools must be equal (taking into account the number of children to be served and their special educational needs) to such expenditures

for public school children; and Chapter 1 services provided to private school children must be equitable in relation to services provided to public school children.[18] The regulations impose certain requirements on the provision of Chapter 1 services to private school children in order to avoid conflict with the religion clauses of the first amendment. These requirements may be obtained from the State Department of Public Instruction.

In addition to the requirements listed above, the Act and its regulations set out three "fiscal requirements" which must be met by school districts receiving Chapter 1 assistance:

1. "Maintenance of effort" requirement. Every year, a school district must spend at least 90% of what it spent the preceding year to meet the needs of educationally deprived children. The Department of Public Instruction may waive this requirement for one year if it determines that such a waiver would be equitable due to exceptional or uncontrollable circumstances such as a natural disaster or severe economic conditions.[19]

2. "Supplement, not supplant" requirement. Chapter 1 funds may be used only to supplement, and where practical increase, the level of funds that would be made available from non federal sources for the education of children participating in Chapter 1 projects. Chapter 1 funds, for the most part, may not be used to supplant non-federal funds.[20]

3. "Comparability of services" requirement. Services in Chapter 1 project ares must be at least comparable to services in non project areas. If all school district attendance areas are project areas, services must be substantially comparable in each area.[21] A United States district court in Puerto Rico has recently held that "comparability" must be based upon both pupil-to-staff ratios and per-pupil staff expenditures.[22] This decision invalidates Department of Education non-regulatory guidelines which permit school districts to satisfy Chapter 1 requirements by using either or both of these criteria. The court also held that services provided in Chapter 1 and non-Chapter 1 schools may not vary more than five percent, thus invalidating the Department of

> Education's guidelines permitting states to establish their "own reasonable limits" for variance between schools.

Wisconsin school districts should direct questions about the requirements of Chapter 1 to the State Department of Public Instruction.

II. Bilingual-Bicultural Education.

In the 1974 case Lau v. Nichols,[23] the United States Supreme Court held that a school system's failure to provide special language assistance for non-English speaking elementary and secondary school students constituted unlawful discrimination in violation of Title VI of the Civil Rights Act of 1964. The Court found that the San Francisco school system denied 1800 non-English speaking students of Chinese ancestry a meaningful opportunity to participate in the system's educational program by failing to provide these students with special language assistance. The opinion stated

> there is no equality of treatment merely by providing students with the same facilities, textbooks, teachers, and curriculum; for students who do not understand English are effectively foreclosed from any meaningful education.[24]

The Supreme Court did not specify a remedy for the discrimination in Lau, although it did recognize teaching the students English and giving them instruction in Chinese as two possibilities.

After Lau, many states enacted bilingual-bicultural education statutes. Wisconsin's bilingual-bicultural education law is contained in Subchapter VII of Chapter 115 of the Statutes relating to public instruction.[25] In addition to the state laws, there is a Federal Bilingual Education Act[26] which offers states financial assistance to develop and supplement bilingual education programs in their schools. Both the federal and Wisconsin bilingual statutes have, as their primary purpose, the provision of equal educational opportunities to children with limited English proficiency.[27]

In Wisconsin, a "limited-English speaking pupil" is defined as a pupil whose ability to use the English language is limited because of the use of a non-English language in his or her family or in his or her daily, nonschool surroundings and who, as a result of limited-English speaking ability, performs below his or her expected grade level in required academic courses which are taught in English.[28] The federal definition of "limited-English proficiency" is similar to Wisconsin's and probably reaches the same pupils.[29]

The Department of Public Instruction regulations implementing Wisconsin's bilingual law require all school districts to assess the students in their schools to determine the students' eligibility for bilingual-bicultural education.[30] School boards must contact the parents of all children eligible to participate in a bilingual-bicultural education program. The notification must be in English and in the pupil's non-English language and it must state that a bilingual-bicultural program may be instituted and must inform the parent of the procedures for registering a child in the program and for giving the required consent for the pupil's enrollment in the program.[31] Within 10 days after the beginning of a school term a pupil's parent may appeal the school board's failure to place the pupil in a bilingual-bicultural education program. The school board must hear this appeal and, if the parent is not satisfied with the school board's decision, he or she may appeal to the State Superintendent.[32]

A limited-English speaking pupil is only eligible for a bilingual-bicultural program in Wisconsin with his or her parents' consent,[33] and then only until he or she is able to perform ordinary classwork in English. The bilingual-bicultural education program must be designed to meet the objective of enabling students to perform ordinary classwork in English.[34]

Wisconsin law requires school districts to establish bilingual-bicultural education programs where there are 10 or more "limited-English speaking pupils" in a particular school, in kindergarten to grade 3, whose parents have consented to the pupils' placement in the program. For grades 4 to 8 and 9 to 12 a program must be established if there are 20 or more such pupils in a particular school. The programs must be taught by bilingual teachers and, for grades 9 to 12, bilingual counselors must be made available.[35]

In Wisconsin, a bilingual-bicultural education program means instruction in reading, writing, and speaking the English language and, in grades K-8, instruction in the limited-English speaking pupil's native language in the subjects "necessary to permit the pupil to progress effectively through the educational system."[36]

Wisconsin law does not require schools to offer native language instruction to pupils in grades 9-12, but schools may do so under an "optional expanded program."[37] In addition, Wisconsin permits schools to offer preschool and summer bilingual-bicultural education programs.[38] The basic federal requirements for a bilingual program are similar to Wisconsin's, except that native language instruction must be given at all grade levels to the extent necessary to allow a child to achieve competence in the English language and to progress effectively through the educational system.[39] Both the federal and Wisconsin laws contain provisions to prevent the isolation of children in bilingual programs from children who are not limited-English speaking pupils and provisions for instruction which reflects the cultural heritage of pupils with limited-English proficiency.[40] In addition, the Department of Public Instruction regulations implementing Wisconsin's law expressly require schools to offer students in bilingual-bicultural education programs full access to supportive services, such as language development and speech therapy available to other students in the district.[41]

There are a number of instances where the federal law with respect to bilingual education is more restrictive than Wisconsin's law. This is significant because a school district's failure to comply with the federal law may result in the withholding of funds otherwise available under the Bilingual Education Act, even if the district is in compliance with all aspects of Wisconsin's Bilingual-Bicultural Education law.

One difference between the two laws, as already noted, is the fact that in Wisconsin native language instruction in grades 9-12 is optional while it is required by the federal law "where necessary." Another conflict arises from the Wisconsin requirement of parental consent for a child's participation in a bilingual-bicultural education program. The federal act has no such provision for parental consent and the Office of Civil Rights argues that participation in the program is the child's rather than the parent's. Other areas of conflict include the Wisconsin provision for the threshhold number of eligible pupils before a bilingual-bicultural education program must be offered (the federal law has no such provision and, presumably, a program must be offered where only one pupil is eligible to participate), and the federal requirement that bilingual programs be developed through consultation with an advisory council composed mainly of parents of children to be served. In Wisconsin such an advisory committee may or may not be established at the school district's option.[42]

School districts should be aware that compliance with Wisconsin's bilingual-bicultural law may not suffice to meet all the requirements of the federal law. In most instances school districts can achieve federal compliance by utilizing the options provided in Wisconsin's law (for example, using parental advisory committees and offering native language instruction in grades 9-12). However, in at least one respect, Wisconsin's parental consent requirement, it may be impossible for a school district to adhere to both state and federal law. That issue will have to be resolved between the state, the Department of Public Instruction, and the Federal Office of Civil Rights.

III. School Finance.

Methods of financing public education vary from state to state. Many states, including Wisconsin, rely on a system of local property taxation supplemented by state aid (allocated through per pupil state aid formulae) and special state and federal fund allocations for particular education programs to finance public education. Several states, including Wisconsin, have had financing provisions challenged for alleged violations of the state and/or federal constitutions.

In 1976, in Buse v. Smith,[43] the Wisconsin Supreme Court held that the "negative aid" provisions of school district financing mandated by Wisconsin Statutes §§ 121.07 and 121.08 (1975) violated the rule of uniform taxation contained in Article VIII, Section 1, of the Wisconsin Constitution. The right to equal educational opportunity in Wisconsin is provided by Article X, Section 3, of the State Constitution. In part this section requires that all district schools be "as nearly uniform as possible." The questions raised in the Buse case were (1) whether the "as nearly uniform as possible" requirement mandated equal dollar expenditures per pupil or the equalization of the revenue raising powers of the various school districts, and (2) if such equalization were required, whether the means chosen to achieve equalization violated other constitutional provisions (particularly Article VIII, Section 1). The Wisconsin Supreme Court held that Article X, Section 3, did not require equalization of revenue raising powers of school districts and that legislation which would compel one school district to levy and collect a tax for the direct benefit of another district or the state, would violate Article VIII, Section 1, of the Wisconsin Constitution.

The critical federal case dealing with the applicability of the equal educational opportunity concept to school finance is San Antonio Independent School District v. Rodriguez,[44] decided by the United States Supreme Court in 1973. In this case the Supreme Court explicitly held that education was not a fundamental right under the United States Constitution and that social class did not constitute a suspect classification. The practical effect of the Rodriguez decision is that states' financing systems which result in disparate per pupil expenditures among school districts will withstand United States Constitutional challenge--at least so long as the disparity cannot be traced to racial discrimination.

Since the Supreme Court's determination in Rodriguez that financing disparities alone do not present U.S. constitutional problems, many financing systems have been challenged in state courts as violative of state constitutional equal protection provisions.

A challenge to a property tax based financing system for public schools was upheld by the California Supreme Court in the 1976 case *Serrano v. Priest*.[45] The California court found that the state's financing system for public schools violated the equal protection guarantees of the state Constitution by conditioning the availability of school revenues upon district wealth and by making quality of education dependent upon district expenditures. The court held that education was a fundamental right under the California Constitution and that discrimination on the basis of wealth involved a suspect classification. The New York Court of Appeals, on the other hand, found that challenged state aid provisions for financing public education did not violate the equal protection clause of the New York Constitution.[46] The Court held that public education is not a fundamental right under the state's Constitution and, therefore, the state's financing system need only be reasonably related to the legitimate state interest of promoting local control of education.[47] These two cases may demonstrate the possibility that the greater the disparity in per-pupil expenditures, the more likely a court will be to find a violation: in California, the disparity in per-pupil expenditures was 1:10,000, while in New York the disparity was only 1:4.5.

A new challenge to Wisconsin's public education financing system is now pending in Dane County Circuit Court.[48] Class representatives embracing both equal protection (*Serrano v. Priest* and others) and municipal overburden (*Buse v. Smith*) theories are present.

IV. *School Fees*.

The issue of whether or not Wisconsin school districts may charge students fees and for what materials and activities revolves around an interpretation of Article 10, Section 3, of the Wisconsin Constitution which states, in part:

> The legislature shall provide by law for the establishment of district schools . . . and such schools shall be free and without charge for tuition to all children between the ages of 4 and 20 years.

In the 1974 case *Board of Education v. Sinclair*, the Supreme Court of Wisconsin interpreted the term "free" for purposes of this constitutional provision to mean "without cost for physical facilities and equipment," and the phrase "without charge for tuition" to mean that there should be no fee charged for instruction. Accordingly the Court concluded

> public schools may sell or charge fees for the use of books and items of a similar nature when authorized by statute without violating article X, Section 3 of the Wisconsin Constitution.[49]

Currently only the sale of textbooks is authorized by statute in Wisconsin[50] but the Court in *Sinclair* described for what other materials and programs the legislature could allow school districts to charge fees and for what materials and programs fees cannot be charged under any circumstances. If authorized by statute, school districts could charge fees for textbooks and workbooks, items such as pencils, pens, notebooks, and paper customarily furnished by pupils for their own use, gym suits, and towels, band instruments, and social and extracurricular activities. The fees charged for these items and activities must be reasonable and they must be tied to actual cost. Among the items which the *Sinclair* court interprets Wisconsin's Constitution as requiring school districts to furnish without charge are electronic listening devices, microfilm and similar devices, and courses credited for graduation even if the course is not part of the schools' required curriculum. In accordance with the State Constitution and *Sinclair* the Wisconsin attorney general has said that public school districts may not charge students for the cost of providing driver education programs if the programs are credited toward graduation. The attorney general did say, however, that certain fees, incidental to the provision of driver education programs, could be charged.[51] The legislature authorized such fees in 1983. The fee can be waived for low-income students.

The attorney general has also said that tuition may be charged for courses at schools of vocational, technical, and adult education because such schools are not "district schools" within the meaning of Article 10, Section 3, of Wisconsin's Constitution which prohibits charges for tuition.[52] In recent years various proposals have been submitted to the Wisconsin legislature to expand the items and programs for which school districts may charge fees.[53]

Even where schools are authorized to charge students fees, it is unclear what sanctions may be imposed for the failure to pay those fees. A United States district court in Indiana has held that a school's suspension of a student for his parent's failure to pay textbook fees violated the due process and equal protection clauses of the fourteenth amendment.[54]

V. Minimum Competency Testing.

Minimum competency testing statutes are often challenged on the basis of discrimination when minorities make up a disproportionate number of the students denied high school diplomas based on their failure to pass the test. In 1981, in the landmark case Debra P. v. Turlington,[55] the United States Court of Appeals for the Fifth Circuit set guidelines for the institution of minimal competency testing as a prerequisite to receipt of a high school diploma:

1. The test must cover only material covered in the classroom.
2. The schedule for the implementation of the test requirement must afford students sufficient notice that they must pass the test in order to graduate.
3. The test items may not be racially or culturally biased.
4. The test must not perpetuate past purposeful discrimination.

Many states, including Wisconsin, have enacted minimal competency testing laws which follow the Fifth Circuit's guidelines. Wisconsin's law enables, but does not require, school districts to develop or adopt tests which reflect the district's curriculum and its minimum standards of proficiency in reading, language arts, and mathematics.[56] The results of the tests may be considered as a requirement for high school graduation,[57] but not sooner than in the 1985-86 school year.[58] To the extent possible the tests must be free of bias.[59] Wisconsin school districts which have been found to have maintained intentionally segregated schools must ensure that the use of the minimal competency test as a prerequisite to high school graduation does not perpetuate past discriminatory practices.

VI. Summary.

Federal and state regulations require school systems to make a special effort to address the unique educational needs of minority group and low income students. Without such treatment, students in these categories are at a disadvantage within traditional school programs. The regulations and the programs which are aimed at serving these students have given rise to major staff alterations within larger districts. New personnel have been hired, whose first job has been to understand the regulations, and whose second job has been to prepare applications for outside funding available in this area. Such programs have taken on a life of their own within school bureaucracies.

These programs, and those for handicapped students described in the next two chapters, seek to integrate children with special needs into regular school programs. The separate programs, staff, and funding sources in and of themselves work against such integration. School staff might benefit from a discussion of the ways in which the operation of special programs, with complicated regulations, serves to isolate staff and students when the goal actually should be more community.

NOTES

[1] 374 U.S. 483 (1954).

[2] *Keyes v. School District No. 1, Denver*, 413 U.S. 189 (1973).

[3] 42 U.S.C. § 2000d tp 200d-6 (1982).

[4] 20 U.S.C. § 1681 (1982).

[5] 29 U.S.C. § 794 (1982).

[6] 20 U.S.C. § 2701 (1982).

[7] 20 U.S.C. § 2701 (1982).

[8] 20 U.S.C. § 3801 (1982).

[9] 20 U.S.C. § 3804 (a) (1982).

[10] 34 C.F.R. § 200.3 (1982).

[11] 34 C.F.R. § 200.50 (1982).

[12] *Valdez v. Grover*, 563 F. Supp. 129 (W.D. Wis. 1983).

[13] 34 C.F.R. § 200.51 (1982).

[14] 34 C.F.R. § 200.52 (1982).

[15] 34 C.F.R. § 200.53 (1982).

[16] *Valdez v. Grover*, 563 F. Supp. 129 (W.D. Wis. 1983). This case was before the court on a motion for preliminary injunction. Therefore, the court ruled only that plaintiffs were likely to succeed at trial on their claim that Chapter 1 requires states to establish parent advisory councils for the development of migrant education plans.

[17] 34 C.F.R. § 200.54 (1982).

[18] 34 C.F.R. §§ 200.70 and 200.71 (1982).

[19] 34 C.F.R. §§ 200.60 and 200.61 (1982).

[20] 34 C.F.R. § 200.62 (1982).

[21] 34 C.F.R. § 200.63 (1982).

[22] *Perez v. Bell*, Civ. Act. No. 80-2352 (D.P.R. 1982).

[23] 414 U.S. 563 (1974).

[24] *Id*. at 566.

[25] Wis. Stat. Ann. §§ 115.95-115.996 (1981).

[26] 20 U.S.C.A. § 3801-3807 (1982).

[27] Wis. Stat. Ann. § 115.95(2) (1981); 20 U.S.C.A. § 3222(a) (1982).

[28] Wis. Stat. Ann. § 115.955(1) (1981) and P.I. 13.01(1).

[29] 20 U.S.C.A. § 3223(1) (1982) and 34 C.F.R. § 500.4 (1982).

[30] P.I. § 13.03.

[31] Wis. Stat. Ann. § 115.96(2) (1981).

[32] Wis. Stat. Ann. § 115.96(5) (1981).

[33] Wis. Stat. Ann. § 115.96(3) (1981).

[34] Wis. Stat. Ann. § 115.97(1) (1981).

[35] Wis. Stat. Ann. §§ 115.97(2), (3) and (4) (1981).

[36] Wis. Stat. Ann. § 115.955(7); P.I. 13.04 (1981).

[37] Wis. Stat. Ann. § 115.955(8); P.I. 13.04 (1981).

[38] Wis. Stat. Ann. § 115.99 (1981).

[39] See 20 U.S.C. §§ 3223(a)(4) (B), (C) and (D) (1982) and Wis. Stat. Ann. § 115.97(1) (1981).

[40] 20 U.S.C.A. § 3223(a)(4)(A)(i) (1982) and P.I. 13.04.

[41] P.I. 13.05

[42] Wis. Stat. Ann. § 115.98 (1981).

[43] 74 Wis 2d 550, 247 N.W. 2d 141 (Wis. 1976).

[44] 411 U.S. 1, *reh'g denied*, 411 U.S. 959 (1973).

[45] 557 P.2d 929; 135 Cal Rptr. 345 (Cal. 1976), *reh'g denied* (1977).

[46] *Board of Educ., Levittown Union Free School Dist. v. Nyquist*, 453 N.Y.S. 2d 643 (N.Y. Ct. App. 1982).

[47] See also, *Washakie County School District No. 1 v. Herschler*, 606 P. 2d 310 (Wyo. 1980), and *Lujan v. Colorado State Bd. of Educ.*, 649 P. 2d 1005 (Colo. 1982).

[48] *Kukor v. Grover*, 79-CV-5252.

[49] 222 N.W. 2d 143, 65 Wis 2d 179, at 182 (Wis. 1974).

[50] See Wis. Stat. Ann. § 120.12 (1981) which provides for books and school supplies to be furnished to indigent students free of charge.

[51] 71 *Op. Wis. Att'y Gen*. 209 (1982).

[52] 64 *Op. Wis Att'y Gen*. 24 (1975).

[53] See 1982 Senate Bill 288 and 1983 Senate Bill 350.

[54] *Carder v. Michigan City School Corporation*, 552 F. Supp. 869 (N.D. Ind. 1982).

[55] 644 F2d 397; see also *Brookhart v. Illinois State Bd. of Educ.*, 697 F2d 179 (7th Cir. 1983) which is discussed in Section II of Chapter 4.

[56] Wis. Stat. Ann. § 118.30(2)(a) (1981).

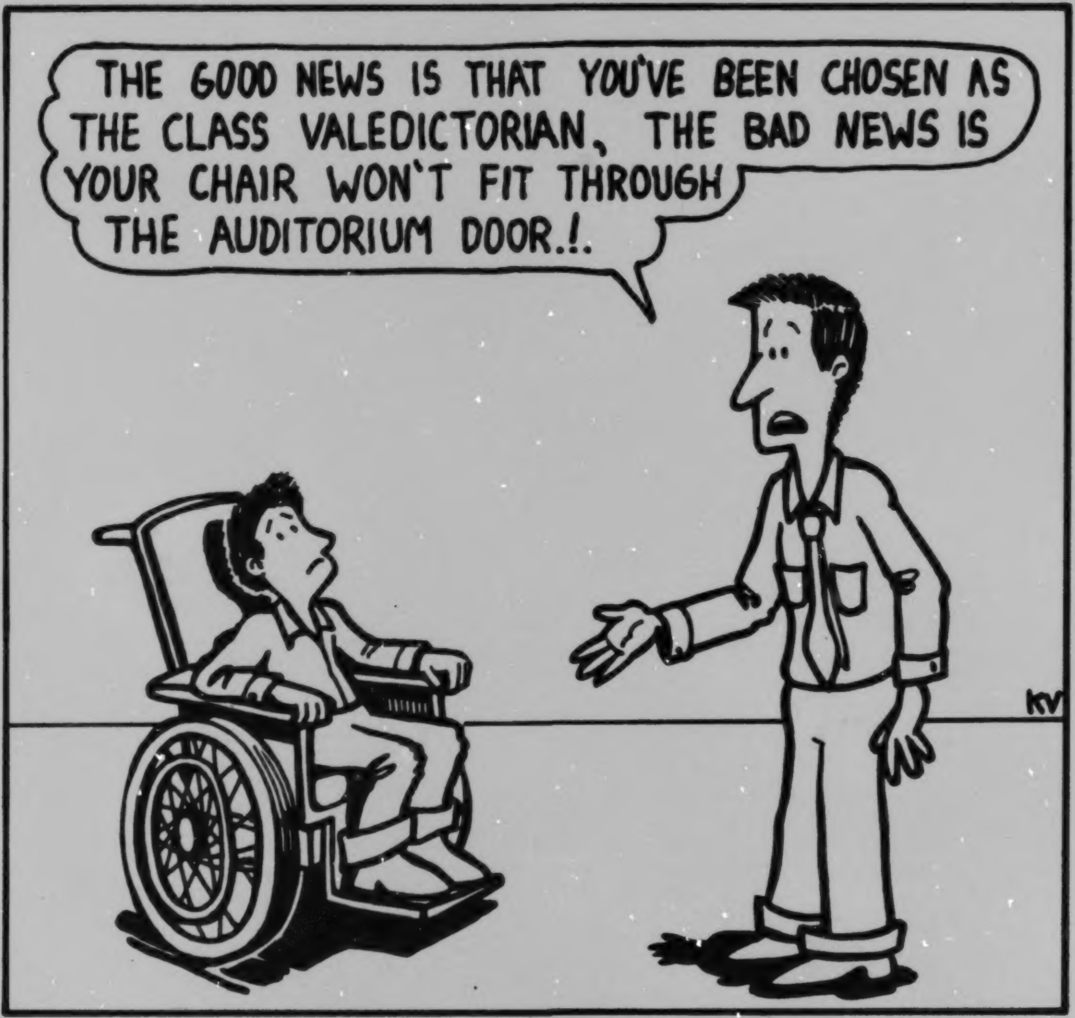
[57] Wis. Stat. Ann. § 118.30(4)(c) (1981).

[58] Wis. Stat. Ann. § 118.30(3)(a) (1981).

[59] Wis. Stat. Ann. §§ 115.28(10)(b) and 118.30(2)(a) (1981).

CHAPTER 9

EDUCATION OF HANDICAPPED CHILDREN: SUBSTANTIVE ISSUES


THE GOOD NEWS IS THAT YOU'VE BEEN CHOSEN AS THE CLASS VALEDICTORIAN, THE BAD NEWS IS YOUR CHAIR WON'T FIT THROUGH THE AUDITORIUM DOOR.!.
KV

1. What are school districts' obligations for serving the educational needs of handicapped children?

2. Who is handicapped under the laws?

3. What is meant by a "free appropriate public education"?

4. When must school districts provide summer programs for handicapped children?

5. What is meant by the "least restrictive environment" for the educational placement of handicapped children?

6. What "related services" must be provided to children receiving special education?

I. Introduction.

Education for handicapped children in Wisconsin is governed by both state and federal laws and regulations. Wisconsin's special education laws are contained in Subchapter V of Chapter 115 of the Wisconsin Statutes covering public instruction. The state legislature made the following policy statement in conjunction with the law's enactment:

> 1. It is the policy of this state to provide, as an integral part of free public education, special education sufficient to meet the needs and maximize the capabilities of all children with exceptional educational needs.
>
> 2. Furthermore, it is the policy of this state to ensure that each child who has exceptional educational needs is provided with the opportunity to receive a special education at public expense suited to his individual needs. To obtain this end, the legislature recognizes the necessity for a flexible program of special education and for frequent reevaluation of the needs, capabilities and progress of a child with exceptional educational needs.
>
> 3. The legislature also recognizes that it is the responsibility of the school district in which a child with exceptional educational needs resides to ensure that the child is able to receive an education at public expense which is tailored

> to his needs and capabilities. Special assistance, services, classes or centers shall be provided whenever necessary.

In 1975 the Congress of the United States enacted Public Law 94-142, also known as the Education for All Handicapped Children Act (hereinafter, simply the "EHCA"). The law is a grant-in-aid program designed to offer financial assistance to states to help them meet their constitutional and statutory obligation of offering handicapped children equal educational opportunities. Because Congress did not define all the terms used in the EHCA, such as "appropriate" education for handicapped children, disagreements over what the Act requires have resulted. Organized groups and individual parents of handicapped children have filed lawsuits asking for additional services which school districts have sometimes denied, pointing to the extraordinary costs associated with them. Courts around the United States have reached different and sometimes conflicting conclusions about the EHCA's requirements. Because the United States Supreme Court has resolved only a few of these issues, the law in this area is extremely unsettled. This makes it difficult to say with precision what the EHCA requires. The facts of individual cases, involving specific children with varying handicaps, also makes generalization harder than in other areas of school law. Finally, the number and complexity of the regulations implementing both the EHCA and Wisconsin special education laws make this area difficult for school personnel.

This and the next chapter summarize the most significant aspects of these laws, cases, and regulations. The chapter is intended to provide only an overview of issues in the education of handicapped children. Information necessary to develop and implement specific special education programs should be obtained from the Department of Public Instruction, Division of Handicapped Children, to ensure compliance with all relevant state and federal laws.

II. Handicapped Children and Special Education.

As used in the EHCA and in its implementing regulations, the term "handicapped children" means children evaluated as being

> mentally retarded, hard of hearing, deaf, speech impaired, visually handicapped, seriously emotionally disturbed, orthopedically impaired, other health impaired, deaf-blind, multi-handicapped, or as having specific learning disabilities, who because of those impairments need special education and related services.[1]

The definition of handicapped children for purposes of Wisconsin's special education laws is similar to that of the EHCA. In Wisconsin a handicapped child is referred to as a child (under 21 years of age) with "exceptional education needs" (or EEN), which means

> any child who has a mental, physical, emotional, or learning disability which, if the full potential of the child is to be attained, requires educational services to the child to supplement or replace regular education.[2]

Both the state and federal laws define EEN and handicapping conditions in terms of the need for "special education." However, not every child in need of special education is covered by the statutes. Wisconsin's Administrative Code specifically exempts from the definition of EEN "educational needs resulting primarily from poverty, neglect, delinquency, social maladjustment, cultural or linguistic isolation or inappropriate instruction."[3] While about half of the states classify gifted and talented children as "exceptional,"[4] neither Congress nor Wisconsin's legislature provided for these children in their special education laws. Provisions for gifted and talented children may be found in other legislation and programs.[5]

Each of the handicapping conditions cited in the EHCA as possibly requiring special education is also enumerated in Wisconsin's law. The types of disabilities recognized in Wisconsin as EEN seem broader than the disabilities included in the federal law, since the Wisconsin law allows the state superintendent to include, where appropriate, handicapping conditions other than those enumerated in the statute. Because in this respect federal judges have given the EHCA a broad interpretation, however, it may be that there is little practical difference between the state and federal definitions of handicapped or EEN children. The most apparent difference in scope between the two laws is that in Wisconsin pregnant students are expressly covered by the special education statutes.[6] It should be noted that a pregnant girl is treated differently from other children with exceptional educational needs in that she may be recommended for special education only if she and her parents consent to the recommendation.[7]

Once a child is evaluated as handicapped or as having exceptional educational needs as defined by the statutes, he or she is then entitled to special education. The EHCA defines "special education" as

> specially designed instruction, at no cost to the parent, to meet the unique needs of a handicapped child, including classroom instruction, instruction in

physical education, home instruction, and instruction in hospitals and institutions.[8]

Wisconsin similarly defines "special education" in terms of "appropriate education."[9] Although the Wisconsin EEN statute's definition of "special education" includes the terms "supportive or related service," while the EHCA definition does not, in practice related services are treated similarly under the two laws. (The requirement to provide appropriate related services is discussed later in this chapter.) The Wisconsin Administrative Code details the types of programs available for the special education of EEN children.[10]

III. Free Appropriate Public Education.

Both federal and Wisconsin law require that all handicapped (or EEN) children be provided with a free appropriate public education. The equal protection clause of the fourteenth amendment[11] and § 504 of the Rehabilitation Act of 1973 require states to provide handicapped children with an education whether or not they participate in a federal grant-in-aid program like the EHCA. The provisions of Wisconsin's compulsory school attendance laws apply to children with exceptional educational needs.[12] (See Chapter 7 for a discussion of the requirements of the compulsory school attendance law.) Under state and federal law, then, Wisconsin must provide handicapped children with a free education, and the children's parents are compelled to send them to school.

In order to qualify for assistance under the EHCA a state must demonstrate, among other things, that it "has in effect a policy that assures all handicapped children the right to a free appropriate public education."[13] This policy must be implemented through a state plan submitted to and approved by the Secretary of Education which sets forth the programs, policies, and procedures designed to ensure that the state's handicapped children receive such an education.[14] Local school districts have the primary responsibility for ensuring that residents of the district who have exceptional educational needs are provided a special education.

Residency for purposes of allocating the responsibility for providing a child with special education programs (and transportation) is determined in the same manner as for children receiving regular education. Children are residents of the school district in which their parents reside unless they live apart from their parents for purposes other than to attend the schools of another district. In the latter case the children are residents of the school district in which they actually live. Following this rule, the State Superintendent has said that children residing at the State Mental Health Institutes and the State

Centers for the Developmentally Disabled are, for school purposes, residents of the school district in which the Institute or Center is located.[15] On the other hand, the special education statute considers a resident of a special purpose residential care center which specializes in the care and treatment of EEN children to be a resident, for school purposes, of the district in which the center is located only if his or her parents reside in the district.[16]

Free Education. Although both the federal and state legislation require that handicapped children be provided with a "free and appropriate education," neither legislature has defined the terms with any precision. It has been left to school districts and, when disputes arise, to the courts to give meaning to these terms on a case-by-case basis. At a minimum the "free" education requirement means that parents of handicapped children may not be charged for special transportation, academic services, or other related services so long as these are found to be necessary to the child's educational program.

It is the responsibility of every Wisconsin school district to provide free transportation to special or regular classes or programs for all resident children who require it. This is an obligation of the district regardless of the distance travelled, even if cross-district transportation is required, if the transportation is approved by the state superintendent.[17]

It is sometimes the case that a school district cannot provide the services a handicapped child requires and that the education must be provided elsewhere. This is a costly alternative. Frequently, then, the question of "alternative" placements is litigated. Wisconsin Statutes say that an EEN child from one school district may be placed in a special education program in another school district or in a private school or facility, at no cost to the child's parents, if the child's home district does not maintain a special education program appropriate for that child.[18] However, if an appropriate public education program is available, but the parents choose to place the child in a private school or facility, the school district is not required to pay for the child's private education.[19] In this situation, the *regular* costs related to a private education (e.g., tuition) must be borne by the parents. However, the federal regulations implementing the EHCA still require school districts receiving funds under the Act to pay for *special education* and *related services* (e.g., physical therapy and transportation) to such private school handicapped children residing in the district.[20] The question of which party pays for these services is often litigated.

In recent years federal courts have been presented with the question of how much a state is required to pay under the EHCA in order to guarantee its handicapped residents a "free" education. As state appropriations and property tax revenues for education decline, this becomes a serious question for most school districts. In 1980 the United States District Court for the Eastern District of North Carolina ruled that a state which accepts EHCA funds cannot refuse to pay for a child's special education based on the state's contention that it cannot afford to send the child to an appropriate special program because of budgetary constraints.[21] In 1982, the United States District Court for the Northern District of Illinois held invalid Illinois state laws which limited state funding for the placement of a handicapped student to an amount less than the actual cost of the placement. The court found such laws to be inconsistent with the EHCA mandate to provide an appropriate free public education.[22]

While the EHCA requires that a handicapped child be provided an appropriate education at no cost to the child's parents, the Act's implementing regulations specify that this requirement "does not preclude incidental fees which are normally charged to non-handicapped students or their parents as a part of the regular education program."[23] (See chapter 8 with respect to fees.) The Secretary of Education has interpreted the EHCA's requirement that an appropriate public education be provided to handicapped children "without charge" or "without cost" to mean that the parents of a handicapped child may not be compelled to use private insurance proceeds to pay for required services where the parents would incur financial loss by so doing. Under the Secretary's interpretation:

> Financial losses include, but are not limited to the following:
>
> 1. A decrease in available lifetime coverage or any other benefit under an insurance policy;
>
> 2. An increase in premiums or the discontinuation of the policy; or
>
> 3. An out-of-pocket expense such as the payment of a deductible amount incurred in filing a claim.
>
> Financial losses do not include incidental costs such as the time needed to file an insurance claim or the postage needed to mail the claim.[24]

Appropriate Education. Like the term "free," the term "appropriate" has not been clearly defined in state or federal legislation or by judicial interpretation of that legislation. Until 1982 representatives of handicapped children had argued with some success that "appropriate education" under the EHCA meant the "best" education available. In 1982 the United States Supreme Court decided *Board of Education of the Hendrik Hudson Central School District v. Rowley* (hereinafter referred to as *Rowley*).[25] While the *Rowley* decision did not state what "appropriate" in the EHCA does mean, it said very clearly that it does *not* mean that school districts must provide handicapped children with the best available education. Some discussion of this important case should help to describe the distinction between "appropriate" and "best," as well as to point out the complexity of the cases in this area.

Rowley arose out of a dispute over the education of Amy Rowley, a deaf child with minimal residual hearing and excellent lip-reading skills. When she began attending school, Amy was placed in a regular kindergarten class for a trial period in order to determine what supplemental services would be necessary for her education. At the end of the trial period, it was determined that Amy should remain in the regular kindergarten class, and she was provided with an FM hearing aid which would amplify words spoken into a wireless receiver during certain classroom activities. Amy successfully completed her kindergarten year. At the beginning of Amy's first-grade year, it was determined that she should be educated in a regular classroom, she should continue to use the FM hearing aid, and she should receive instruction for one hour a day from a tutor for the deaf and for three hours a week from a speech therapist.

The Rowleys agreed with these provisions but insisted that Amy also be provided with a qualified sign-language interpreter in all of her academic classes. Such an interpreter had been tried in Amy's kindergarten class but, after a two-week experimental period, the interpreter had reported that Amy did not need his services at that time. The school administrators determined that Amy did not need a sign-language interpreter in her first-grade classroom. Appeals under the EHCA are first made administratively. The Rowleys appealed the denial of their request to two levels within New York's administrative hierarchy and lost both times. Following the end of possible administrative appeals, they then appealed their case to the United States District Court for the Southern District of New York, claiming that the denial of a sign-language interpreter constituted a denial of the "free appropriate public education" guaranteed by the EHCA.[26]

The district court found that Amy "performs better than the average child in her class and is advancing easily from grade to grade," but that "she understands considerably less of what goes on in class than she would if she were not deaf" and thus "is not learning as much, or performing as well academically, as she would without her handicap."[27] The district court, defining "free appropriate public education" as "an opportunity to achieve full potential commensurate with the opportunity provided to other children,"[28] found that Amy was not receiving such an education. The Second Circuit Court of Appeals affirmed the district court's decision but the United States Supreme Court reversed, finding that

> the requirement that a state provide specialized educational services to handicapped children generates no additional requirement that the services so provided be sufficient to maximize each child's potential "commensurate with the opportunity provided other children."[29]

The Supreme Court, after analyzing the EHCA's language and its legislative history, concluded that the "basic floor of opportunity" provided by the Act "consists of access to specialized instruction and related services which are individually designed to provide educational benefit to the handicapped child."[30] The Court summarized the requirements of the EHCA as follows:

> Insofar as a State is required to provide a handicapped child with a "free appropriate public education," we hold that it satisfies this requirement by providing personalized instruction with sufficient support services to permit the child to benefit educationally from that instruction. Such instruction and services must be provided at public expense, must meet the State's educational standards, must approximate the grade levels used in the State's regular education, and must comport with the child's IEP.* In addition, the IEP, and therefore the personalized instruction, should be formulated in accordance with the requirements of the Act and, if the child is being educated in the regular classrooms of the public education system, should be reasonably calculated to enable the child to achieve passing marks and advance from grade to grade.[31]

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*An Individualized Education Program (IEP) is a written statement of educational goals and the types of special education and related services to be provided to meet these goals. An IEP must be developed for each handicapped child.

The Rowley Supreme Court majority concluded that, in reviewing the findings and decision of a state administrative hearing, a Court's inquiry is limited to two questions: 1) Has the state complied with the procedures set forth in the EHCA? and 2) Is the IEP developed through the Act's procedures reasonably calculated to enable the child to receive educational benefits? If these requirements are met, the Court held, "the State has complied with the obligations imposed by Congress and the courts can require no more."[32] In short, handicapped children must receive a program of benefit, but not the best program which parents or specialists in the area might conceive.

IV. Wisconsin Placement Alternatives.

The Wisconsin special education statute sets out a number of alternatives for the appropriate placement of an EEN child.[33] These placements are to be considered sequentially as follows:

1. If the child's home school district or county, or the cooperative educational service agency (CESA) for that district, operates an appropriate special education program, the child must be placed in that program.

2. The child may be placed in a model school special education program if no agency listed in number one above operates an appropriate program, or if requested by the child's parents and recommended by the multidisciplinary team (the responsibilities of the multidisciplinary team [M-team] are discussed in the next chapter).

3. If no agency listed in number one above operates an appropriate program, the child will be placed in an appropriate in-state public program as near as possible to the place where the child resides unless an out-of-state public program is found to be more appropriate. In order for an out-of-state placement to be made it must be found that a) there is no appropriate program available in Wisconsin without the use of a boarding home or residential placement center, and the out-of-state placement will enable the child to live at home and receive daily transportation to and from the placement, or b) the out-of-state placement, as compared with an otherwise appropriate instate placement, will result in a significant reduction in daily transportation costs or in the child's

time in transit between the program and the child's home.

4. If no equivalent public program is available, a school board may, upon the approval of the state superintendent, contract with a private special education service if the placement is warranted on the basis of a less restrictive environment alternative. Such special education services may not include religious or sectarian teachings or instruction.

5. The child may be placed in a special education program at the child's home or other residence only upon a physician's statement in writing that the child is unable to attend school.

Whichever of the alternative placements available under Wisconsin law is chosen as the appropriate program for an EEN child, the child's home school district must pay any tuition and transportation charges incurred in the placement.

Constitutional Challenges to Alternative Placements. Because the Wisconsin special education statute permits children to be placed in private programs, some of which may be run by religious organizations, the question has been raised about whether or not the requirement that the school district pay for the private services violates the establishment or free exercise clauses of the First Amendment of the United States Constitution or the similar provisions of the Wisconsin Constitution. In 1973, in the case of *State ex rel. Warren v. Nusbaum*,[34] the Supreme Court of Wisconsin held that the provisions of the state's special education statute authorizing a school board to contract with a private educational service do not violate any of the religion clauses of the United States or Wisconsin Constitutions.

Another question which has been raised in Wisconsin with respect to the placement of an EEN child in a private special education program is whether or not equal protection is denied by the consideration of a private placement only if no equivalent public program is available. In *Panitch v. State of Wisconsin*, plaintiffs, EEN children in Wisconsin, claimed that equal protection tenets are violated to the extent that under the state law "a child with an exceptional educational need could be forced to live away from home--at an appropriate *public* facility located at some distant part of the state--even though an appropriate *private* facility was available in his own neighborhood."[35] The United States District Court for the Eastern District of Wisconsin rejected the plaintiffs' equal protection claim and upheld the state's preference for a public over a private placement. The court's opinion shed some light on the meaning of "appropriate" education in Wisconsin:

> While the state must provide each child with an equal educational opportunity, it is not necessarily required to do so in the context of a "neighborhood" or conveniently accessible setting, especially where, as here, a virtually infinite range of special educational needs must be met with limited resources.[36]

It is important to note that this case was decided prior to the enactment of the EHCA and the adoption of its implementing regulations. While the decision may still be sound in terms of the fourteenth amendment, a similar challenge to the placement under the EHCA may be successful in light of the regulation which requires a child's educational placement to be as close as possible to the child's home.[37]

Summer Education. In recent years, United States federal courts have consistently held that summer education may be required in order to provide a handicapped child with an appropriate education. Wisconsin's special education statute expressly permits a special education program to include a summer program or even to be a full year, July 1-June 30 program. Pennsylvania, Georgia, and Mississippi, on the other hand, had rules which prohibited special education programs from extending beyond 180 days per year. In separate cases, a district court and two circuit courts of appeal struck down the "180-day rules" as violating the EHCA.[38] The courts found that such rules preclude the proper determination of an appropriate education by failing to consider the individual needs of handicapped children. Some children, then, have specific handicaps which must be addressed through extended-year programs.

The fact that states may not adhere to a strict 180-day rule does not mean that every handicapped child is entitled to attend a summer or extended-year program. In Rettig v. Kent City School District, the United States District Court for the Northern District of Ohio held that just because a summer program would be beneficial to a handicapped child is not enough to make it mandatory under the EHCA: "the issue is not whether it might be beneficial but whether a summer school program is a necessary component of an appropriate education for [a particular handicapped child]."[39] The court's standard for determining the appropriateness of a summer program was whether or not it would prevent significant regression of skills or knowledge retained by the handicapped child which would affect seriously the child's progress towards self-sufficiency. On the basis of the facts presented, the Rettig court did not order a summer school program for the child, but the judge said that if a new individualized education program for the child were to call for summer school, such instruction should be provided.

In *Anderson v. Thompson*, a case which is controlling in Wisconsin, the United States District Court for the Eastern District of Wisconsin held that a free appropriate public education may, depending on the needs of the particular child, include year-round educational programming. Where such programming is required, federal law imposes on the child's home school district the obligation to provide such an education.[40]

The Sixth Circuit Court of Appeals has held that, once a determination is made that a summer education program is a necessary part of the appropriate education of a handicapped child, that program may not be discontinued without following the change in placement procedures mandated by the EHCA.[41] (These procedures are described in Chapter 10.) While this case is not binding in Wisconsin, it seems likely that Wisconsin courts would adopt the rationale of the Sixth Circuit.

Least Restrictive Environment. Closely related to the question of what constitutes an appropriate education are the concepts of "least restrictive environment" and "mainstreaming." These terms refer to the express legislative preference, of both the Wisconsin and the United States special education laws, for educating handicapped children in regular classrooms whenever appropriate.[42] In order to qualify for assistance under the EHCA, a state must demonstrate, among other things, that it has established procedures to ensure the following:

1. That to the maximum extent appropriate, handicapped children, including children in public or private institutions or other care facilities, are educated with children who are not handicapped, and
2. That *special classes, separate schooling*, or other removal of handicapped children from the regular educational environment occurs, only when the nature or severity of the handicap is such that education in regular classes with the use of supplementary aids and services cannot be achieved satisfactorily.[43]

Each district in the state must ensure that a continuum of alternative placements is available to meet the educational needs of handicapped children. The continuum must include the following placements (from least to most restrictive): instruction in regular classes, special classes, special schools, home instruction, and instruction in hospitals and institutions.[44]

Other requirements under the least restrictive environment provision are the following:

1. unless a handicapped child's individualized education program requires some other arrangement, the child is to be educated in the school which he or she would attend if not handicapped;[45]

2. in selecting the least restrictive environment, consideration is to be given to any potential harmful effect on the child or on the quality of services which he or she needs;[46]

3. to the maximum extent appropriate to the needs of a handicapped child, the child is to participate with nonhandicapped children in nonacademic and extracurricular services and activities;[47]

4. teachers and administrators must be provided with technical assistance and training necessary to assist them in their effort to educate a handicapped child in the least restrictive environment.

The requirement of the least restrictive environment for the education of handicapped children reaches residents of institutions as well as children living at home: "Regardless of other reasons for institutional placement, no child in an institution who is capable of education in a regular public school setting may be denied access to an education in that setting."[48] As discussed earlier in this chapter, residents of State Mental Health Institutes and State Centers for the Developmentally Disabled in Wisconsin are considered residents, for special education purposes, of the school district in which the center or institute is located. Therefore, Wisconsin and federal laws require that the districts in which the centers and institutes are located provide educational programs to the children who reside in these facilities and who are able to attend a public school program during the day.[49]

The clearest statement to date of the EHCA's mainstreaming or least restrictive environment requirement was recently provided by the Sixth Circuit Court of Appeals:

> The Act does not require mainstreaming in every case but its requirement that mainstreaming be provided to the maximum extent appropriate indicates a very strong congressional preference. The proper inquiry is whether a proposed placement

> is appropriate under the Act. In some cases, a placement which may be considered better for academic reasons may not be appropriate because of the failure to provide for mainstreaming.
>
> . . . In a case where the segregated facility [i.e., a facility serving only handicapped children] is considered superior, the court should determine whether the services which make that placement superior could be feasibly provided in a non-segregated setting [i.e., a setting in which both handicapped and non-handicapped children are served]. If they can, the placement in the segregated school would be inappropriate under the Act. Framing the issue in this manner accords the proper respect for the strong preference in favor of mainstreaming while still realizing the possibility that some handicapped children simply must be educated in segregated facilities whether because the handicapped child would not benefit from mainstreaming, because any marginal benefits received from mainstreaming are far outweighed by the benefits gained from services which could not feasibly be provided in the non-segregated setting, or because the handicapped child is a disruptive force in the non-segregated setting.[50]

It is likely that a similar position would be taken by Wisconsin courts; therefore, Wisconsin educators would do well to follow the guidelines provided by the Sixth Circuit in deciding whether or not to mainstream handicapped students.

V. Related Services.

Another EHCA requirement, interrelated with the mandates of free appropriate education and education in the least restrictive environment, is the provision of related services. The EHCA and its implementing regulations define related services almost identically:

> The term "related services" means transportation, and such developmental, corrective and other supportive services . . . as may be required to assist a handicapped child to benefit from special education . . . .[51]

Under the EHCA's "free appropriate public education" requirement, a state must provide each handicapped child with specially designed instruction and those related services which are necessary to enable the child to benefit from the instruction. The Wisconsin Department of Public Instruction has interpreted

Wisconsin's "free appropriate public education" requirement to mean the same thing.[52]

As the official comments to the EHCA regulations explain, related services may not be provided unless a child is in need of special education:

> *Comment.* (1) The definition of "special education" is a particularly important one under these regulations, since a child is not handicapped unless he or she needs special education. (See the definition of "handicapped children" in § 300.5.) The definition of "related services" (Section § 300.13) also depends on this definition, since a related service must be necessary for a child to benefit from special education. *Therefore, if a child does not need special education, there can be no "related services," and the child (because not "handicapped") is not covered under the Act.*[53] (Emphasis added.)

Not even all handicapped children (that is, children in need of special education) are entitled to receive related services. It is important to note that a handicapped child is entitled to receive only such related services as are required to assist the child to benefit from special education. The Supreme Court's 1982 *Rowley* decision, rejecting the interpretation of free appropriate public education as requiring states to maximize the potential of handicapped children commensurate with the opportunity provided to other children, narrowly interprets the requirement that handicapped children be provided related services to enable them to benefit from special education. The Court ruled that Amy Rowley was not entitled to the related service of a sign-language interpreter because she was benefiting from her special education without one. While a sign-language interpreter might have enabled Amy to reach her full potential, the Court ruled that the states have no obligation to so maximize a handicapped child's potential as long as the child receives "some form of specialized education."[54]

The courts have recognized a right to related services if they enable a handicapped child to be educated in the least restrictive environment. In order to satisfy the EHCA's requirement that, to the maximum extent appropriate, handicapped children be educated with nonhandicapped children, a Texas District Court ordered a school district to provide a child with an air-conditioned classroom, since the child could not adequately regulate his body temperature.[55] The court found that the school district's provision of an air-conditioned semi-isolated cubicle in the classroom for the child, which segregated him from his nonhandicapped classmates, violated the mainstreaming provisions of the EHCA.

The question of whether schools must provide medical services to handicapped children under the related services requirement is frequently litigated. The Act defines related services to include medical services for diagnostic or evaluation purposes only. "Medical services" means "services provided by a licensed physician to determine a child's medically related handicapping condition which results in the child's need for special education and related services."[56] Litigation in this area involves questions of whether or not a particular treatment is a medical service under the Act. Only if a particular service can be characterized as other than a medical service will a child be entitled to receive the service on an ongoing basis as part of his or her special educational program.

In a case addressing these issues, the Hawaii Department of Education was ordered to pay tuition and transportation costs for a handicapped child to attend a private regular school where a trained person would be on hand to reinsert her tracheostomy tube periodically.[57] The court rejected the Department's solution of providing the child with home instruction (where, presumably, a trained family member could aid her if the tube needed reinserting) because, but for the possibility of problems with her tracheostomy, the child could be placed in the least restrictive educational environment -- regular school. Courts have also recognized a child's entitlement to catheterization as a related service when the service is necessary to enable the child to receive a free appropriate public education in the least restrictive environment.[58] In these cases, the insertion of a tracheostomy tube and catheterization were determined not to be medical services.

The regulations implementing the EHCA contain a list of related services which must be provided if necessary to enable a handicapped child to benefit from his or her special education program (including education in the least restrictive environment)

> speech pathology and audiology, psychological services, physical and occupational therapy, recreation, early identification and assessment of disabilities in children, counseling services, and medical services for diagnostic or evaluation purposes, . . . school health services, social work services in schools, and parent counseling and training.[59]

The comments to the regulations specify that "the list of related services is not exhaustive and may include other developmental, corrective, or supportive services (such as artistic and cultural programs, and art, music, and dance therapy), if they are required to assist a handicapped child to benefit from special education."[60] Wisconsin's special education law[61] is very similar to the EHCA in its treatment of related services.

The types of related services which may be required by the EHCA are as many and varied as are the special needs of handicapped children. Consequently, neither Congress nor Wisconsin's legislature can specify what particular related services will be required in individual cases. The courts will decide on a case-by-case basis what services will be required under the Act. School districts in Wisconsin should contact the Department of Public Instruction with questions about the provision of related services. This is true whether the question deals with the educational program or environment or with medical services.

VI. Other Laws

In addition to the EHCA and provisions of Wisconsin Statutes, there are other federal acts which have a bearing on the treatment of handicapped children. Among these are Section § 504 of the Rehabilitation Act of 1973 and the Elementary and Secondary Education Act of 1965 (Public Law 89-313). Courts have found that a school district must provide services to handicapped children based on the provisions of these acts.

Section § 504 of the Rehabilitation Act of 1973. Section § 504 states:

> No otherwise qualified handicapped individual in the United States . . . shall, solely by reason of his handicap, be excluded from the participation in, be denied the benefits of, or be subjected to discrimination under any program or activity receiving federal financial assistance . . . .[62]

The § 504 regulations define "handicapped individual" more broadly than does the EHCA. In order to be covered a person must (1) have a physical or mental impairment which substantially limits one or more major life activities, (2) have a record of such an impairment, or (3) be regarded as having such an impairment.[63] A person does not need to require special education in order to receive protection under this law. Section § 504 also has a broader equal opportunity mandate than does the EHCA. The law prohibits discrimination in employment, transportation, and postsecondary education in addition to requiring a free appropriate public education at the preschool, elementary, and secondary levels.

In order to meet the free appropriate public education requirement, an educational agency receiving federal monies must provide regular and special education and related aids and services that "are designed to meet individual educational needs of handicapped persons as adequately as the needs of nonhandicapped persons are met . . . ."[64] The regulations expressly provide that this requirement may be met by the implementation of an IEP developed in accordance with the EHCA.[65] For practical purposes, then, school districts which follow the EHCA's substantive and procedural guidelines set out in this chapter and the next will be in compliance with § 504's free appropriate public education requirement.

P.L. 89-313. Many Wisconsin school districts receive their funding under the Elementary and Secondary Education Act of 1965. P.L. 89-313 of this Act provides for programs for handicapped children.[66] The regulations implementing this provision are contained in volume 34, *Code of Federal Regulations* (C.F.R.), Part 302. The requirements imposed on school districts by P.L. 89-313 are similar, but not identical, to those imposed by the EHCA.[67] School districts receiving funding under P.L. 89-313 should review the regulations and contact the Department of Public Instruction for technical assistance.

VII. Summary.

The federal Education of All Handicapped Children Act, and the Wisconsin Statute which preceded it, have changed the ways in which school districts relate to a significant number of students. New programs, new ways of dealing with individuals and new procedures have all been initiated. The regulations for educating the handicapped are voluminous, as the summary of them contained in this and the next chapter indicates. Reasonable people do not always agree as to what constitutes an "appropriate education" for a handicapped child. The wide spectrum of possible handicapping conditions adds to the complexity of the special education area. This chapter has described the parameters of what is meant by an "appropriate education." Chapter 10 explains the procedures which must be followed in determining what special educational program is appropriate for a handicapped child. In addition, special issues relevant to graduation requirements, discipline, and extracurricular activities will be discussed.

NOTES

[1] 34 C.F.R. § 300.5(a)(1982); see also 20 U.S.C. § 1401(1)(1982).

[2] Wis. Stat. Ann. § 115.76(3) (1981).

[3] Wis. Admin. Code [Pub. Ins't.] § 11.34(2) [hereinafter, simply P.I. ____].

[4] See Steven S. Goldberg, *Special Education Law* (New York: Plenum Press, 1982), p. 112.

[5] See, for example, the Federal Gifted and Talented Children's Education Act of 1978, 20 U.S.C. § 3311 et seq. (1982).

[6] The statute covers, "Pregnancy, including up to 4 months after the birth of the child or other termination of the pregnancy, or after the close of the school year." Wis. Stat. Ann. § 115.76(3)(h) (1981)

[7] Wis. Stat. Ann. § 115.80(3)(d) (1981).

[8] 20 U.S.C. § 1401(17) (1982). The implementing regulations contain an identical definition. 34 C.F.R. § 300.14(a)(1) (1982).

[9] Wis. Stat. Ann. § 115.76(10) (1981).

[10] P.I. § 11.21-11.26.

[11] See *Pennsylvania Association for Retarded Children (PARC) v. Commonwealth of Pennsylvania*, 343 F. Supp. 279 (E.D. Pa. 1972), and *Panitch v. State of Wisconsin*, 444 F. Supp. 320 (E.D. Wis. 1977).

[12] Wis. Stat. Ann. § 115.82 (1981).

[13] 20 U.S.C. § 1412(1) (1982).

[14] 20 U.S.C. § 1413 (1982).

[15] State of Wisconsin, Department of Public Instruction (DPI) Policy Statement, March 1, 1983.

[16] Wis. Stat. Ann. § 115.85(1)(a)(2) (1981).

[17] Wis. Stat. Ann. § 121.54(3) (1981); Wis. Stat. Ann. § 115.88(2) (1981).

[18] Wis. Stat. Ann. § 115.85(2); 34 C.F.R. § 300.401; 34 C.F.R. § 300.302 (relating to public and private residential placements).

[19] 34 C.F.R. § 300.403(a).

[20] 34 C.F.R. § 300.450-460; Office of Civil Rights, Division of Assistance to the States, Bulletin #39, EHLR 203:07.

[21] *Hines v. Pitt Cty. Bd. of Educ.*, 497 F. Supp. 403 (E.D. N.C. 1980).

[22] *Parks v. Pavkovic*, 536 F. Supp. 296 (N.D. Ill. 1982).

[23] 34 C.F.R. § 300.14(b)(1) (1982).

[24] Department of Education Policy Interpretation Under Pub. L. No. 94-142 and § 504, 45 *Fed. Reg*. 86390 (December 30, 1980).

[25] *Rowley v. Board of Educ. of the Hendrik Hudson Central School*, 102 S.Ct. 3034 (1982).

[26] *Rowley v. Board of Educ. of the Hendrik Hudson Central School Dist.*, 483 F. Supp. 528 (S.D.N.Y. 1980).

[27] *Rowley*, 102 S.Ct. at 3040.

[28] *Rowley*, 483 F. Supp. at 534.

[29] *Rowley v. Board of Educ. of the Hendrik Hudson Central School*, 102 S.Ct. at 3046, *reversing*, 632 F.2d 945 (2d Cir. 1980).

[30] *Id*. at 3048.

[31] *Id*. at 3049.

[32] *Id*. at 3051.

[33] Wis. Stat. Ann. § 115.85(2) (1981).

[34] 64 Wis. 2d 314, 219 N.W. 2d 577 (Wis. 1973).

[35] *Panitch v. State of Wisconsin*, 390 F. Supp. 611, 614 (E.D. Wis. 1974). The statute's language has changed since this 1974 decision but the effect is still the same as quoted here.

[36] *Id*.

[37] 34 C.F.R. § 300.552(a)(3) (1982).

[38] *Georgia Association of Retarded Citizens v. McDaniel*, 511 F. Supp. 1263 (N.D. Ga. 1981); *Battle v. Commonwealth of Pennsylvania*, 629 F.2d 269 (3d Cir.) (1980), *cert. denied sub. nom. Scanlon v. Battle*, 450 U.S. 911 (1981); *Crawford v. Pittman*, 708 F.2d 1028 (5th Cir. 1983).

[39] *Rettig v. Kent City School District*, 539 F. Supp. 768 (N.D. *Ohio 1981)*.

[40] *Anderson v. Thompson*, 495 F. Supp. 1256 (E.D. Wis.), *aff'd*, *658 F.2d 1205 (7th Cir.* 1982).

[41] *Tilton v. Jefferson County Board of Education*, 705 F.2d 800 (6t*h Cir. 1983)*.

[42] See 1973 Wis. Law, chapter 89, § 1 (4).

[43] 34 C.F.R. § 300.550(b) (1982); see also 20 U.S.C. § 1412(5)(B) (1982).

[44] 34 C.F.R. § 300.551 (1982).

[45] 34 C.F.R. § 300.552(c) (1982).

[46] 34 C.F.R. § 300.552(d) (1982).

[47] 34 C.F.R. § 300.553 (1982).

[48] Official Comment to 34 C.F.R. § 300.554.

[49] DPI Policy Statement, March 1, 1983.

[50] *Roncker on Behalf of Roncker v. Walter*, 700 F.2d 1058, (6th *Cir. 1983) at 1063*.

[51] 20 U.S.C. § 1401(17) (1982); see also 34 C.F.R. § 300.13(a) (1982).

[52] DPI, Division for Handicapped Children, Bulletin No. 81-6 (1981).

[53] Official Comment to 34 C.F.R. § 300.14 (1982).

[54] *Rowley*, at 3045 (see fn.29 *supra*).

[55] *Espino v. Besteiro*, 520 F. Supp. 905 (S.D. Tex. 1981).

[56] 34 C.F.R. § 300.13(b)(4) (1982).

[57] *Department of Educ. State of Hawaii v. Katherine D.*, 531 F. Supp. *517 (D. Hawaii 1982)*.

[58] *Tokarcik v. Forest Hills School District* 665 F.2d 443 (3d Cir.), *cert. denied sub. nom. Scanlon v. Tokarcik*, 102 S.Ct. 3508 (*1982); Tatro v. State of Texas*, *703 F.2d 823* (5th Cir. 1983); See a*lso Department of Education Policy Interpretation

under Pub. L. No. 94-142 and § 504, 46 *Fed. Reg*. 4912 (January 19, 1981).

[59] 34 C.F.R. § 300.13(a) (1982).

[60] Official Comment to 34 C.F.R. § 300.13 (1982).

[61] E.g., DPI Division for Handicapped Children, Bulletin No. 81-6 (1981).

[62] 29 U.S.C. § 794 (1982).

[63] 34 C.F.R. § 104.3(j) (1982).

[64] 34 C.F.R. § 104.33(b)(1) (1982).

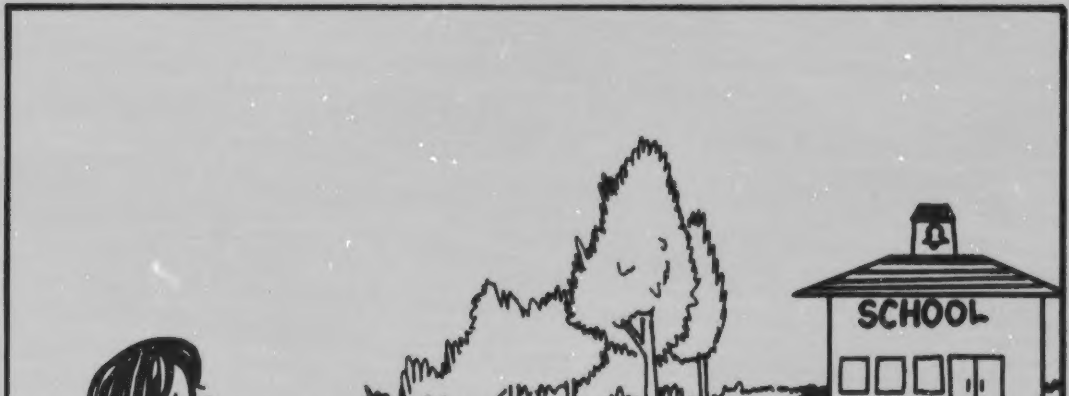
[65] 34 C.F.R. § 104.33(b)(2) (1982).

[66] 20 U.S.C. §§ 2771, 2772. The law has been reenacted as Pub. L. No. 95-561 but it is still better known as Pub. L. No. 89-313.

[67] For a comparison of the requirements of the two acts, see *Association of Retarded Citizens in Colorado v. Frazier*, 517 F. Supp. 105 (D. Colo. 1981).

CHAPTER 10

EDUCATION OF HANDICAPPED CHILDREN: PROCEDURAL REQUIREMENTS AND OTHER ISSUES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1. What procedures must be followed for the evaluation and placement of handicapped children?

2. What procedural safeguards are available to parents who disagree with a school district's decisions with respect to the evaluation and placement of their child?

3. May handicapped children be required to pass a minimal competency examination in order to receive a high school diploma?

4. What special measures must be taken with respect to the discipline of handicapped children?

5. What do the laws require with respect to the provision of extracurricular activities for handicapped children?

6. When may a school district be sued for its failure to provide a handicapped child with an appropriate education?

I. Procedural Obligations.

Both federal and Wisconsin special education laws specify detailed procedures for the identification and evaluation of handicapped (those with exceptional educational need or EEN) children and for the development of a specialized education program for each of them. These procedures are the means by which school districts are to carry out the requirement that they provide handicapped children with a free appropriate education. The procedural requirements associated with the identification, placement, and evaluation of handicapped children are complex. The language of the statutes and regulations is in mandatory form (e.g., an IEP, or individualized educational program, meeting must be held within 30 days after a multidisciplinary team determines that a child is in need of special education). However, because the regulations are so numerous and complex, courts are likely to apply a good-faith standard when evaluating a school district's compliance. Therefore, every attempt must be made to follow the procedures (including the timelines) mandated by the regulations. So long as district administrators strive to meet those mandates, it is unlikely that technical noncompliance will result in a loss of funding under the Act. Likewise, it is recognized that funding curtailment ultimately injures the intended beneficiaries of the grant program, the EEN youngsters themselves; accordingly, this sanction may be expected to be applied only as a last resort.

It is not possible here to give a detailed analysis of every legal requirement involved in the identification, evaluation, and placement of handicapped children. Nonetheless, a step-by-step outline of the legal requirements is essential to ensure that the state and federal laws are followed. Such an outline, including timeliness and administrative interpretations and recommendations, was developed for Wisconsin by the Department of Public Instruction in 1980 and is available for use by school districts.[1] This section will review the major requirements of the state and federal laws.

Identification of Handicapped Children. Wisconsin law requires physicians, nurses, teachers, psychologists, social workers, and social agency administrators, who have reasonable cause to believe that a child brought to them for services has exceptional educational needs, to report the child's name and other relevant information to the child's school district. A child's parent may also report this information to the school district if he or she suspects the child of having exceptional educational needs.[2] If the report is made by other than the child's parent, the parent must be given prior notice of the report.[3] Upon the receipt of a report and with parental approval, a multidisciplinary team (M-team) must examine the child to determine if he or she is in need of special education (i.e., is a child with EEN).[4] The makeup of the M-team is to be determined by the particular exceptional educational need(s) that the child is believed to have so that the professionals evaluating the child will be familiar with assessment of and programming for the child's needs.[5]

Both the EHCA and Wisconsin regulations caution against the use of standardized tests and evaluation materials and procedures which discriminate against ethnic or racial minorities.[6] When a referral concerns a minority child, Wisconsin law requires that a member of that child's minority be allowed input into the M-team's decision-making process. School districts should take notice of the special procedures required when dealing with minority group students.

Placement of Handicapped Children. Within 30 days after the M-team determines that a child is in need of special education, a meeting must be held to develop an individualized education program (IEP) for the child. The EHCA defines the term "individualized education program" as

> a written statement for each handicapped child . . . which statement shall include (a) a statement of the present levels of educational performance of the child, (b) a statement of annual goals, including short-term instructional objectives, (c) a statement of the specific education services to be provided to

> such child, and the extent to which such child will be able to participate in regular educational programs, (d) the projected date for initiation and anticipated duration of such services, and (e) appropriate objective criteria and evaluation procedures and schedules for determining, on at least an annual basis, whether instructional objectives are being achieved.[7]

The written statement just described must be developed at a meeting attended by representatives of the educational agency who are familiar with the child's evaluation and who are qualified to provide or supervise the type of special education the child will need (including the child's teacher), one or both of the child's parents (or a surrogate appointed if the child's parents cannot be located), and, where appropriate, the child.[8] The child's parents may have a child advocate accompany them during any phase of the M-team and IEP process.[10]

Based on the IEP, the child's school district must determine the appropriate special education program in which to place the child.[11] The child's parent must be notified, in writing, of the district's placement decision.[12] Upon the parent's consent, the child is placed in the appropriate special education program. This placement must be made as soon as possible after the IEP meeting,[13] but not more than 30 days after parental consent is obtained.[14]

An IEP must be in effect at the beginning of every school year for each handicapped child.[15] A meeting to revise a child's IEP must be held at least once a year.[16] Every child receiving special education must be reevaluated by an M-team at least once every three years to determine if the child continues to need special education.[17] In order for a school district to be in compliance with the EHCA, each handicapped child's IEP must include all services necessary to meet the child's identified special education needs, and all services in the IEP must be provided.[18]

Procedural Safeguards. The EHCA and Wisconsin's special education law and their implementing regulations include a number of provisions designed to protect the rights of handicapped children and their parents and to ensure "fundamental fairness" in the evaluation and placement process. Because there are so many of these provisions, and school districts often maintain checklists to ensure that none has been forgotton.

The parents of a handicapped child must be afforded an opportunity to inspect and review all education records with respect to their child's identification, evaluation, educational placement, and the provision of a free appropriate public education to the child.[19] Parents have the right to obtain an independent evaluation of their child if they disagree with the M-team evaluation.[20] In some cases the evaluation may be obtained at public expense. The parent of a handicapped child must be given written notice before a public agency proposes to, or refuses to, initiate or change the identification, evaluation, or educational placement of the child or the provision of a free appropriate public education to the child.[21] Parental consent must be obtained before conducting an M-team evaluation and before the initial placement of a child in a special education program.[22] (Specific procedures must be followed in order to override a parent's refusal to consent to the child's evaluation or placement.)[23]

The statutes and regulations contain an appeal process entitling parents to impartial due process hearings and ultimately to judicial review of decisions relating to the special education of their child.[24] In Wisconsin a parent's first appeal is to the school board.[25] If dissatisfied with the board's decision, the parent or educational agency may file an appeal to the state superintendent for an impartial administrative review of the decision.[26] The superintendent's decision may be appealed to the court for the circuit or county in which the child resides.[27] Parties may also bring an action in federal court for relief under the EHCA.[28] As discussed in the previous chapter, the Supreme Court's *Rowley* decision limits judicial review of the findings and decision of the state administrative hearing to two points: (1) Has the state complied with the procedures set forth in the EHCA? and (2) Is the IEP developed through the Act's procedures reasonably calculated to enable the child to receive educational benefits?

At the hearings, parties have the rights to (1) be accompanied and advised by an attorney and by individuals with special knowledge or training with respect to the problems of handicapped children; (2) present evidence and confront, cross-examine, and compel the attendance of witnesses; (3) prohibit the introduction of evidence that has not been disclosed to the party at least five days before the hearing; (4) obtain a verbatim record of the hearing; and (5) obtain the written findings of fact and decisions of the hearing officer.[29] The hearing officer who presides over an initial appeal and the reviewing officer presiding over an appeal to the state superintendent must be impartial.[30] The Director of Special Education Programs, Department of Education, has interpreted this requirement to mean that "[State Education Agency] employees, chief state school officers, and members of state boards of education are categorically prohibited from serving as either hearing or reviewing officers . . . ."[31] Various review procedures in other states which involved state education agency employees have been successfully challenged in court.[32]

During the pendency of judicial and administrative appeals, a child's placement is subject to what is commonly called the "stay-put" requirement. Unless the educational agency and the handicapped child's parents agree otherwise, the child must remain in his or her "then current educational placement" until the conclusion of the appeal process.[33] The statutes and the Wisconsin Department of Public Instruction's regulations permit a program change without parental consent "only if the health or safety of the child or others would be endangered by delaying the change in assignment."[34] Pursuant to the stay-put provision, courts have prohibited states and school districts from denying tuition payments for a child's continued education in a private institution while the placement was being appealed.[35] On the other hand, the courts have denied parents' claims for tuition when they have unilaterally moved their handicapped child from one school to another pending their appeals of a proposed placement.[36]

II. Minimal Competency Testing and Graduation Requirements.

In 1983 the United States Court of Appeals for the Seventh Circuit ruled that handicapped students could be required to pass a minimal competency test as a prerequisite to receipt of a high school diploma.[37] This decision is controlling in Wisconsin. The Seventh Circuit case was based on the denial, by the Peoria, Illinois, School District, of high school diplomas to eleven handicapped children who had failed the test. Prior to 1980, in order to receive a diploma, students had to meet two requirements: 1) earning seventeen credits, and 2) completing state requirements such as a constitution test and a consumer education course. In 1980 the third requirement was added--passing the test. Plaintiffs, the eleven handicapped children, had one to one and a half year's notice of the implementation of the test requirement. The students claimed that the denial of diplomas based on the test violated, among other things, provisions of the EHCA.

Based on Rowley, the Seventh Circuit determined that the EHCA "does not require 'specific results,' but rather only mandates access to specialized and individualized educational services for handicapped children."[38] Therefore, the court held:

> Denial of diplomas to handicapped children who have been receiving the special education and related services required by the Act, but are unable to achieve the educational level necessary to pass the M.C.T. is not a denial of a "free appropriate public education."[39]

The court said that the test must be selected and administered to minimize the effects of the handicapped students' disabilities.

That is, a test may have to be administered to a blind student in braille, but the content of the test need not be altered.

While a test may be a prerequisite to the receipt of a diploma, handicapped students must have sufficient notice of the requirement in order to ensure that the students are sufficiently exposed to most of the material that will appear on the test, or to enable a student's parents and teachers to make a reasoned and well informed decision that the particular student will be better off concentrating on educational objectives other than preparation for the test. The Seventh Circuit ordered the school district to award high school diplomas to the eleven plaintiffs because they had been given inadequate notice of the test requirement. A reasonable notice would probably be notice given to students upon high school entrance.

III. Student Discipline.

Many court cases support the conclusion that handicapped children are not immune from school disciplinary action.[40] Handicapped students may be disciplined just like nonhandicapped students except that they may not be disciplined for behavior which is related to their handicap. While handicapped children have the right to an education in the least restrictive environment, the comments to the EHCA regulations specify that placement in a regular classroom is inappropriate for a child who is so disruptive in the classroom that the education of other students is significantly impaired.[41] This does not mean, however, that a disruptive handicapped child can be expelled through the usual expulsion procedures discussed in Chapter 5. The courts have consistently held that expulsion of a handicapped child constitutes a change in the child's educational placement and is subject to all of the EHCA procedures required for such a change.[42] These procedures include evaluation of the child, development of a new IEP, offer of a new placement, and opportunity to appeal the change in placement, as discussed in the first section of this chapter.

The stay-put provision of the EHCA prohibits the expulsion of a handicapped student until the placement and appeal process has been completed. The official comment to the stay-put provision states, however, that this does not preclude a school from using its normal procedures for dealing with children who are endangering themselves or others.[43] Courts have interpreted this to mean that students may be suspended temporarily without employing the procedural requirements of the EHCA.[44]

Regardless of the procedural safeguards employed, a handicapped child cannot be expelled for behavior which is a manifestation of the child's handicap. Prior to expulsion, the school board must consult with the child's evaluation and placement committee or with other trained and knowledgeable persons to determine whether or not there is a relationship between the child's misconduct and his or her handicap.[45]

In 1982 the Wisconsin State Superintendent was called upon to decide whether or not a child with exceptional educational needs could be expelled for his "repeated violation of school rules" (leaving school without permission, being in possession of tobacco products on school premises, and selling marijuana to a student at school). The student's conduct was found to threaten the health and safety of his fellow students and to be disruptive of the educational environment of the district schools. Based on the testimony given by a member of the child's M-team that the child's handicapping condition, mental retardation, had no bearing on his conduct in selling marijuana in school, the State Superintendent upheld the district's expulsion decision.[46] At least one court has held that even when a school district may properly expel a handicapped student, it may not terminate all educational services to the child.[47] This is the case for all expelled students in Wisconsin.

IV. Physical Education, Athletics, and Extracurricular and Nonacademic Services and Activities.

The regulations implementing the EHCA require the provision of nonacademic and extracurricular services and activities to handicapped children, as follows:

1. Each public agency shall take steps to provide nonacademic and extracurricular services and activities in such manner as is necessary to afford handicapped children an equal opportunity for participation in those services and activities.

2. Nonacademic and extracurricular services and activities may include counseling services, athletics, transportation, health services, recreational activities, special interest groups or clubs sponsored by the public agency, referrals to agencies which provide assistance to handicapped persons, and employment of students including both employment by the public agency and assistance in making outside employment available.[48]

The U.S. District Court for the Northern District of Ohio found a school district to be in violation of this regulation when it failed to provide after-school activities for an autistic student while providing such activities for its nonhandicapped students.[49]

The regulations also require the provision of physical education services.[50] The comment to the physical education regulation includes the following statement from a report of the House of Representatives on P.L. 94-142:

> The Committee expects the Commissioner of Education to take whatever action is necessary to assure that physical education services are available to all handicapped children, and has specifically included physical education within the definition of special education to make clear that the committee expects such services, specially designed where necessary, to be provided as an integral part of the educational program of every handicapped child.

The least restrictive environment requirement of the EHCA applies to nonacademic activities, such as meals, recess periods, and the extracurricular and nonacademic services described above. These services must be provided in a setting as integrated as possible.[51]

The rights of handicapped children to participate in extracurricular activities often arise out of § 504 of the Rehabilitation Act of 1973 (hereinafter simply, § 504). Section § 504 prohibits the discrimination against an "otherwise qualified handicapped individual" solely by reason of his or her handicap. The law applies to any program or activity which receives federal financial assistance. The Office of Civil Rights (formerly of the Department of Health, Education, and Welfare) has interpreted § 504 to prohibit the exclusion from contact sports of students who have lost an organ, limb, or appendage: "The exclusion from contact sports of students who have lost an organ, limb, or an appendage (e.g. a kidney, leg, or finger) but who are otherwise qualified is a denial of equal opportunity. It denies participation not on the basis of ability but because of a handicap." The interpretation allows schools to require students to obtain parental consent and a doctor's approval in order to participate. If the school system provides its athletes with medical care insurance, the insurance must be available to handicapped athletes on the same terms.[52]

The U.S. District Court in the Northern District of New York has held that § 504 was not violated by a school district's refusal to allow a handicapped child to participate in an extracurricular class trip to Spain. The court found that child had difficulty getting around and would be subjected to "a substantial degree of physical risk to her safety" were she to participate in the trip. The Court found that the child was not "otherwise qualified" within the meaning of § 504.[53]

V. Confidentiality and Access to Records.

Both federal and Wisconsin regulations provide for the confidentiality of information with respect to the evaluation and education of handicapped children.[54] The federal regulations also contain provisions for parental access to and amendment of the records of their handicapped child.[55] The Wisconsin Attorney General has said that school districts' release of special education information required by the Department of Public Instruction does not violate the confidentiality requirements of the laws.[56] School districts are advised to have an official records custodian to insure confidentiality and control access to files.

The Office of Special Education of the Department of Education has interpreted the Family Educational Rights and Privacy Act (20 U.S.C. 1232g) and the EHCA confidentiality regulations to prohibit representatives of teacher organizations from attending IEP meetings. The Office found that the legislative intent was to limit attendance at IEP meetings to only those who have "an intense interest in the child." Since a representative of a teacher organization would be concerned with the interests of the teacher rather than the interests of the child, the Office reasoned that it would be inappropriate for the representative to attend the meeting.[57]

VI. Liability, Damages, and Noncompliance Issues.

The issue of monetary damages usually arises in a court proceeding when the parents of a handicapped child request reimbursement for out-of-pocket expenses incurred in the education of their child. The parents claim that the state or local educational agency should have paid for these expenses in the first place. The three major questions which usually arise in such cases are these: 1) Does the EHCA provide for a private cause of action? 2) Must a parent exhaust the EHCA's administrative remedies before bringing an action in court? 3) Does the EHCA permit the award of damages?

Private Cause of Action. As detailed earlier in this chapter, the EHCA contains an elaborate system for administrative review of a public agency's actions with respect to the education of a handicapped child. Handicapped children and their parents must be afforded the opportunity to present complaints with respect to the child's education.[58] In order to protect this right to present a complaint, the EHCA grants the right to obtain judicial review of the administrative complaint procedure.[59] Thus, the EHCA expressly provides for a private cause of action to enforce its provisions.[60]

Exhaustion of Administrative Remedies. The EHCA provides a judicial remedy if a person is "aggrieved by the findings and decision" made under the Act's administrative review procedure.[61] This means that a person must first pursue (exhaust) the administrative remedy prior to bringing a civil action in court. Courts dispense with the requirement that a person exhaust administrative remedies when the pursuit of those remedies would be futile. The U.S. District Court for the Northern District of Illinois, for example, has found the pursuit of EHCA administrative remedies to be futile when the administrative decision would come too late to remedy the situation, or when the complainant can accurately predict an unfavorable administrative ruling because the remedy sought would be in contravention of a established statewide policy.[62] The Second Circuit Court of Appeals, on the other hand, has ruled that administrative remedies must be exhausted even when the administrative review is conducted by the State Commissioner of Education whose policy is being challenged.[63] Since neither case is binding in Wisconsin and each situation presents different facts, it remains unclear when administrative review will be considered futile in this state.

Damages under the EHCA. The EHCA regulations expressly limit the liability of institutions and individuals responsible for the provision of special educational services:

> Each public agency must provide special education and related services to a handicapped child in accordance with an individualized education program. *However . . . the Act does not require that any agency, teacher, or other person be held accountable if a child does not achieve the growth projected in the annual goals and objectives.*[64] (Emphasis added.)

The official comment to this regulation explains that the IEP does not constitute a guarantee by a public agency or teacher that a child will progress at a specified rate. However the comment continues, "*this provision does not relieve agencies and teachers from making good faith efforts to assist the child in achieving the IEP goals and objectives.*" (Emphasis added.)

The remedy most clearly contemplated by the EHCA is the revision of a child's special education program if it is not found to fulfill the requirement of providing the child with a free appropriate public education.[65] Nonetheless, the Seventh Circuit Court of Appeals has found two "exceptional circumstances" in which a limited damage award might be appropriate. (The court did not actually decide if a damage award would be appropriate since the case before it did not exhibit these exceptional circumstances.) In the first such circumstance a court subsequently determines that there was a serious risk of injury to the child's health unless the parents made alternative arrangements to those offered by the school system. If the school district should have provided the necessary services, this court would order the district to recompense the parents for the cost of those services. The second exceptional circumstance warranting the award of damages would exist when the administrative agency responsible for fulfilling the procedural safeguards provided by the EHCA acts in bad faith by, "in an egregious fashion," failing to comply with the Act's procedural provisions.[66]

NOTES

[1] DPI Division for Handicapped Children, "Clarification of Initial Referral, Evaluation, IEP and Placement Process," Bulletin No. 80-7 (1980).

[2] Wis. Stat. Ann. §§ 115.80(1)(a) and (b) (1981).

[3] Wis. Stat. Ann. § 115.80 (1)(c) (1981); for contents of notice and parental consent, see 34 C.F.R. 300.505 (1982).

[4] Wis. Stat. Ann. § 115.80 (1981); P.I. §§ 11.32(2) and 11.03(2) (1981).

[5] Wis. Stat. Ann. § 115.80(3)(a) (1981); P.I. § 11.03(3) (1983).

[6] 34 C.F.R. § 300.530(b) (1982); P.I. § 11.03 (12) (1983); see also *Larry P. v. Riles*, 343 F. Supp. 1306 (N.D. Cal. 1973), *aff'd*, 502 F.2d 963 (9th Cir. 1974), and *PASE v. Hannon*, 506 F. Supp. 831 (N.D. Ill. 1980). For other evaluation procedure requirements, see 34 C.F.R. § 532 (1982).

[7] 34 C.F.R. § 300.343 (1982).

[8] 20 U.S.C. § 1401(19) (1982); 34 C.F.R. § 300.346 (1982).

[9] 20 U.S.C. § 1401(19) (1982); 34 C.F.R. § 300.344 (1982).

[10] P.I. § 11.03(7); 34 C.F.R. § 300.344 (1982). P.I. § 11.01(2)(f)8 defines "child advocate" as "any person representing the parent during the M-team process or at a board hearing."

[11] Wis. Stat. Ann. § 115.85(2) (1981), P.I. § 11.04; 34 C.F.R. § 300.552 (1982).

[12] P.I. § 11.03(11); for contents of notice, see Wis. Stat. Ann. § 115.81(2)(d) (1981), P.I. § 11.33(1)(b).

[13] 34 C.F.R. § 300.342(b)(2) (1982).

[14] P.I. § 11.04(1)(b) (1983).

[15] 34 C.F.R. § 300.342 (1982).

[16] 34 C.F.R. § 300.343(d) (1982); P.I. § 11.33(2) (1983).

[17] Wis. Stat. Ann. § 115.80(5) (1981); 34 C.F.R. § 300.534 (1982).

[18] Department of Education Policy Interpretation under Pub. L. No. 94-142, 46 Fed. Reg. 5460 (January 19, 1981).

[19] 34 C.F.R. § 300.502 (1982).

[20] 34 C.F.R. § 300.503 (1982); Wis. Stat. Ann. § 115.81(5) (1981).

[21] Wis. Stat. Ann. § 115.81 (1981); 34 C.F.R. § 300.504(a) (1982). See also 34 C.F.R. § 300.505 (1982) for contents of notice.

[22] 34 C.F.R. § 300.504(b) (1982).

[23] 34 C.F.R. § 300.504(c) (1982).

[24] Wis. Stat. Ann. § 115.81 (1981); P.I. § 11.06 (1983); 20 U.S.C. § 1415 (1982); 34 C.F.R. §§ 300.500-514 (1982).

[25] Wis. Stat. Ann. § 115.81(1) (1981); P.I. § 11.06(2) (1983).

[26] Wis. Stat. Ann. § 115.81(7) (1981); P.I. § 11.06(9) (1983).

[27] Wis. Stat. Ann. § 115.81(8) (1981); P.I. § 11.06(10) (1983).

[28] 20 U.S.C. § 1415(e)(2) (1982).

[29] 34 C.F.R. § 300.508 (1982); see also P.I. § 11.06(5) (1983).

[30] 34 C.F.R. § 300.507, § 300.510 (1982).

[31] Office of Civil Rights Division of Assistance to the States, Bulletin No. 107, 2 E.H.L.R. 203:68 (January 26, 1983).

[32] See for example *Manahan v. State of Nebraska*, 645 F.2d 592 (5th Cir. 1981).

[33] 20 U.S.C. § 1416(a) (1982); 34 C.F.R. § 300.513(a) (1982).

[34] P.I. § 11.06(4)(g) (1983); see also Wis. Stat. Ann § 115.81(3) (1981).

[35] *Grymes v. Madden*, 672 F.2d 321 (3rd Cir. 1982); *Vander Malle v. Ambach*, 673 F.2d 49 (2d Cir. 1982); *Parks v. Pavkovic*, 536 F. Supp. 296 (N.D. Ill. 1982).

[36] *Stemple v. Board of Educ. of Prince George's Cty.*, 623 F.2d 893 (4th Cir.), *cert. denied*, 450 U.S. 911 (1981); *Mark R. v. Board of Educ., Bremen Community High School Dist.*, 546 F. Supp. 1027 (N.D. Ill. 1982). See also *Zvi D. v. Ambach*, EHLR 554:226 (2d Cir. 1982).

[37] *Brookhart v. Illinois state Bd. of Educ.*, 697 F.2d 179 (7th Cir. 1983).

[38] *Id.* at 183.

[39] *Id.*

[40] *Kaelin v. Grubbs*, 682 F.2d 595 (6th Cir. 1982); *Stuart v. Nappi*, 443 F. Supp. 1235 (D. Conn. 1978); *Doe v. Koger*, 480 F. Supp. 225 (N.D. Ind. 1979).

[41] Official Comment to 34 C.F.R. § 300.552 (1982); 682 F.2d 595 (6th Cir. 1982).

[42] *Kaelin v. Grubbs*; *S-1 v. Turlington*, 635 F.2d 342 (5th Cir. 1980), *cert. denied*, 454 US 1030 (1981).

[43] 34 C.F.R. § 300.513 (1982).

[44] *Stuart v. Nappi*; *Kaelin v. Grubbs*; see fn. 38 *supra*.

[45] *Kaelin v. Grubbs*; *S-1 v. Turlington*; *Doe v. Koger*; see fns. 40 and 42 *supra*.

[46] *In re Kerry C., Expulsion from Lake Holcombe School District of Kerry C.*, DPI Decision and Order No. 91 (1982).

[47] *S-1 v. Turlington*, 635 F.2d 342 (5th Cir., 1981).

[48] 34 C.F.R. § 300.306 (1982).

[49] *Rettig v. Kent City School District*, 539 F. Supp. 768 (N.D. Ohio 1981).

[50] 34 C.F.R. § 300.307 (1982).

[51] *Id*. at § 300.553.

[52] HEW Office of Civil Rights Policy Interpretation under § 504 of the Rehabilitation Act of 1973, 43 *Fed. Reg*. 36035 (August 8, 1978).

[53] *Wolff v. South Colonie Central School Dist*., 534 F. Supp. 758 (N.D.N.Y. 1982).

[54] 34 C.F.R. §§ 300.560-300.576 (1982); P.I. § 11.05 (1983).

[55] 34 C.F.R. §§ 300.567-300.570 (1982).

[56] 65 *Op. Wis. Att'y Gen*. 1 (1976).

[57] Department of Education, Office of Special Education Policy Interpretation under Pub. L. No. 94-142, 46 *Fed. Reg*. 5466-5467 (January 19, 1981).

[58] 20 U.S.C. § 1415(b)(1)(E) (1982).

[59] 20 U.S.C. § 1415(e)(2) (1982).

[60] See *Parks v. Pavkovic* 536 F. Supp. 296 (N.D. Ill. 1982); *Miener v. State of Missouri*, 673 F.2d 969 (8th Cir. 1982), *cert. denied*, 103 S.Ct 215 and 103 S.Ct. 230 (1982); and *Anderson v. Thompson*, 658 F.2d 1205 (7th Cir. 1981).

[61] 20 U.S.C. § 1415(e)(2) (1982).

[62] *Parks v. Pavkovic*, see fn. 60 *supra*.

[63] *Riley v. Ambach*, 668 F.2d 635 (2d Cir. 1981). See also *Shannon v. Ambach*, 3 EHLR 553:198 (E.D.N.Y. 1981).

[64] 34 C.F.R. § 300.349 (1982).

[65] See 20 U.S.C. § 1415 (1982).

[66] *Anderson v. Thompson*, fn. 60 *supra*; but see *Miener v. State of Missouri*, fn. 60 *supra*, which *held* that damages are not available under the EHCA under any circumstances.

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Comments on "Student Rights and Responsibilities: A Handbook on School Law in Wisconsin"

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